SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

CECIL I. HUST PETITIONER,

vs.

MOORE-McCORMACK LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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[fol. 1] [Caption omitted]

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IN THE SUPREME COURT OF OREGON

CECIL I. HUST, Plaintiff-Respondent,

vs.

MOORE-MCCORMACK LINES, INC., Defendant-Appellant

PRAECIPE FOR RECORD—Filed October 1, 1945

To the Clerk of the Above Entitled Court:

In order to enable the plaintiff-respondent herein to apply for a writ of certiorari from the Supreme Court of the United States, the said plaintiff-respondent requests you to prepare a transcript of the record of this cause, duly certified and authenticated, consisting of the following documents and portions of said record, showing the dates thereof.

1. Complaint.
2. Answer.
3. Reply.
4. Verdict, together with the direction for entry of judgment thereon.
5. Judgment of the Circuit Court of the State of Oregon for Multnomah County.
6. Motion for Judgment Notwithstanding the Verdict and Order Denying the Same.
7. Notice of Appeal and Proof of Service thereof.
8. Undertaking on Appeal.
9. Order Allowing Appeal.
10. Assignments of Error.
11. Opinion of Oregon Supreme Court reversing judgment.
12. Final Judgment and Mandate based on said opinion.
13. Journal entry or Order overruling Petition for re-[fols. 4-7] hearing.
14. Petition for order staying execution and enforcement of judgment and mandate to enable application for writ of certiorari and petition for extension thereof.
15. Order staying execution and enforcement of judgment and mandate and order extending same.

16. Bond on application for writ of certiorari and stipulation extending same.

17. The bill of exceptions, including photostatic or otherwise certified copies of exhibits 1, 2, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, 26 and 27, but omitting all others; and including the attached transcript of testimony omitting the following lines and pages:

* * * * * * *

[fol. 8] 18. This praecipe and the stipulation below.

19. Certificate of the Clerk of the Supreme Court of Oregon.

Dated this 28th day of September, 1945.

(S.) Edwin D. Hicks, Of Attorneys for Plaintiff-Respondent.

Stipulation

It is stipulated that the foregoing designated portions of the record of this cause shall, subject to the reservation below, constitute the record on review, and that the omitted portions of the record have, as counsel are now advised, no bearing upon the issues to be presented upon the application for writ of certiorari; but this shall not preclude either counsel from suggesting a diminution of the record should any of said portions, in the opinion of counsel, become material.

(S.) Edwin D. Hicks, Of Attorneys for Plaintiff-Respondent. (S.) Erskine Wood, Of Attorneys for Defendant-Appellant.

Service of a true copy of the within praecipe and stipulation accepted this 28th day of September, 1945.

(S.) Erskine Wood, Of Attorneys for Defendant-Appellant.

[fol. 9] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

CECIL I. HUST, Plaintiff,

vs.

MOORE-McCORMACK LINES, INC., a Corporation, Defendant

COMPLAINT—Filed September 24, 1943

Comes now the plaintiff above named and for cause of action against the defendant above named complains and alleges:

I

That at all times herein mentioned, defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware with a principal office and place of business in the City of Portland, County of Multnomah, State of Oregon. That said corporation is engaged generally in the operation of ocean-going ships and vessels carrying freight. Said ships and vessels ply between the Port of Portland, Oregon, and other ports in the United States and various foreign ports. That among said vessels which said defendant corporation operates, manages and controls is a vessel generally known as "a liberty ship", named the S. S. "Mark Hanna".

II

That heretofore and on or about the 9th day of March, 1943, and prior thereto, plaintiff herein was employed by said defendant on said vessel in the capacity of fireman and watertender. That plaintiff in said employment earned the sum of $110.00 per month and found, plus 85¢ per hour for all overtime work performed, together with bonus for sea duty; that plaintiff earned in the aggregate in said employment approximately the sum of $330.00 per month and found. That said plaintiff at the time of the accident hereinafter described was a healthy and able-bodied man of the age of 36 years with a life expectancy of 31.07 years.

[fol. 10] III

That on or about March 17th, 1943, plaintiff while acting in the regular scope and course of his said employment on said vessel, and obeying the commands and directions of defendant, sustained serious and permanent injuries through the negligence and carelessness of defendant, as follows: That on said date said vessel was proceeding in a general westerly direction on the Atlantic Ocean toward the Port of Spain, Trinidad, being in tow at that time by another vessel. That at approximately the hour of 7:30 A. M. on said day, defendant ordered and directed plaintiff and several other seamen to obtain a large mooring line to be used for the purpose of towing; that said mooring line was located in the upper boatswain's locker in the forepeak on the second deck; that said plaintiff with other seamen went below to the second deck in the forepeak for the accomplishment of said purpose and while on the second deck in the forepeak of said vessel, said plaintiff was caused to fall into the lower boatswain's locker to the third deck, a distance of approximately 12 feet, striking on a steel manhole cover projecting approximately six inches above the deck of said boatswain's locker; that said manhole cover had sharp protruding edges and steel nuts on the surface thereof.

IV

That said defendant was careless and negligent in the following particulars, to-wit:

1. In failing and neglecting to provide any light for said boatswain's lockers, and compelling plaintiff to carry on his directed work in total darkness.

2. In failing and neglecting to maintain the guard chain around the opening to the lower boatswain's locker.

3. In maintaining an open aperture to said lower boatswain's locker through which seamen on said vessel could have fallen, and particularly this plaintiff.

4. In requiring this plaintiff to work in a place of danger.

5. In failing and neglecting to warn this plaintiff of the [fol. 11] dangers then and there attendant upon the work which plaintiff was directed to perform.

6. In operating an unseaworthy vessel.

V

That as the direct and proximate result of said negligence of said defendant plaintiff suffered severe bruises and contusions to his lower back and right thigh, a laceration of his right ankle, and compression fractures of the vertebrae of his middle back, for which plaintiff was hospitalized for approximately five weeks, and said injuries necessitated that he wear a body cast, which plaintiff was compelled to endure until on or about July 12th, 1943; that plaintiff has been caused to suffer great and grievous pain, agony and discomfort, and has sustained permanent injuries to the bones, muscles, tendons, sinews and ligaments of his middle back, and plaintiff has been informed and believes, and therefore alleges that he will never be able to follow his occupation as a seaman, all to his damage in the sum of Fifty Thousand ($50,000) Dollars.

VI

That by reason of said injuries, plaintiff has lost wages in the sum of One Thousand — ($1980.00) Dollars which plaintiff alleges by way of special damages.

VII

That this action is brought under the Merchant Marine Act of 1920, Section 33 thereof, and plaintiff hereby elects to maintain said action in the State courts of the State of Oregon and requests a jury trial.

Wherefore, plaintiff prays for judgment against the defendant for the full sum of Fifty Thousand ($50,000.00) Dollars, general damages; for the further sum of One Thousand — ($1980.00) Dollars, special damages; and for plaintiff's costs and disbursements incurred herein.

(S.) Green & Landye & Nels Peterson, Attorneys for Plaintiff.

[fol. 12] *Duly sworn to by Cecil I. Hust. Jurat omitted in printing.*

[fol. 13] [File endorsement omitted]

IN THE CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

ANSWER—Filed November 23, 1943

Comes now the defendant, and answering the complaint in this cause, admits, denies and alleges as follows:

I

Answering paragraph I, defendant admits its corporate existence as alleged, and that it is engaged in the operation of ships carrying freight, and that some of them ply between Portland and other ports in the United States and other ports of the world. Admits that at the time of the accident alleged it was operating the Liberty ship SS. Mark Hanna for and on behalf of the United States of America, represented by the War Shipping Administration under a written Agency Agreement prescribing and limiting the duties, authority and functions of this defendant. The remaining allegations of said paragraph I defendant denies.

II

Answering paragraph II, defendant denies that plaintiff was employed by said defendant on said vessel or at all. Defendant admits plaintiff's earnings on the ship as alleged; also admits his age, health and life expectancy as alleged. The remaining allegations of said paragraph defendant denies.

[fol. 14] III

Answering paragraph III, defendant admits that plaintiff, on or about March 17, 1943, while acting in the scope of his employment on the ship (but not in any employment by this defendant), fell a distance of approximately 10 or 12 feet and was injured, and that this occurred while the vessel was being towed toward the Port of Spain. The remaining allegations of said paragraph defendant denies.

IV

Defendant denies each and every allegation of paragraph IV.

V

Defendant admits that plaintiff suffered compression fractures of certain vertebrae of his middle back necessitating hospitalization and the wearing for a time of a body cast, but denies each and every other allegation of said paragraph V.

VI

Defendant denies every allegation of paragraph VI.

VII

Defendant admits that the action was attempted to be brought under the Merchant Marine Act of 1920, but denies that it can be; and admits the remaining allegations of said paragraph.

For a further and separate answer and defense, defendant alleges that plaintiff was injured because of his own negligent act in entering a dark place on the ship without attempting to procure any light and without taking any precautions or steps of any kind to see where he was stepping or walking in the semi-darkness.

Wherefore, defendant prays that plaintiff take nothing, and that judgment be entered for defendant accordingly.

(S.) Wood, Matthiessen & Wood, Erskine Wood and L. L. Tatum, Attorneys for Defendant.

[fol. 15] *Duly sworn to by K. C. Tripp. Jurat omitted in printing.*

Service of the foregoing, by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on this 23rd day of November, 1943, is hereby admitted.

(S.) Green & Landye, Of attorneys for Plaintiff.

[fol. 16] IN THE CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

REPLY—Filed May 15, 1944

Comes now the plaintiff, Cecil I. Hust, and for reply to the "Further and Separate Answer and Defense" of defendant, admits, denies and alleges:

Denies, each and every allegation set forth in said further and separate answer and defense.

Wherefore, plaintiff prays that he have and recover of and from the defendant the relief prayed for in his complaint.

(S.) Green & Landye, Edwin D. Hicks, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 17] *Duly sworn to by Cecil I. Hust. Jurat omitted in printing.*

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 11th day of May 1944.

(S.) E. Wood, Attorney for Defendant.

[fol. 18] [File endorsement omitted]

IN THE CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

VERDICT—Filed May 18, 1944

We, the jury, duly empanneled and sworn to try the above entitled civil action, do find our verdict as follows:

We find that Cecil I. Hust, the Plaintiff herein, was an employee of Moore-McCormack Lines, Inc., a corporation, Defendant herein, on the 17th day of March, 1943, and that the said Plaintiff sustained injuries in the course of his

employment with said Defendant Company on the said 17th day of March, 1943.

We do further find our verdict in favor of the Plaintiff, Cecil I. Hust, and against the Defendant, Moore-McCormack Lines, Inc., a corporation, and assess Plaintiff's damages in the sum of $35,000.00.

Dated this 17th day of May, 1944.

(S.) Victor J. Dyck, Foreman.

[fol. 19] IN THE CIRCUIT COURT OF MULTNOMAH COUNTY

CECIL I. HUST, Plaintiff,

vs.

MOORE-McCORMACK LINES, INC., a Corporation, Defendant

JUDGMENT—May 18, 1944

This cause having come on for trial on Friday, the 12th day of May, 1944, before the Honorable Martin W. Hawkins, Judge of the above entitled Court, plaintiff appearing in person and by his attorneys, Green & Landye, by B. A. Green, and Edwin D. Hicks, the defendant appearing by its attorneys, Erskine Wood and Lofton L. Tatum, a jury having been duly impaneled and sworn to try said cause did hear the opening statements of the respective counsel, the testimony produced on behalf of the plaintiff and the testimony produced on behalf of the defendant, whereupon the jury, having heard the closing arguments of respective counsel and having been instructed by the Court as to the law, and the Court having submitted upon request of plaintiff a special interrogatory to be answered by the jury, the jury did thereupon retire for its deliberation upon the 17th day of May, 1944, and upon said 17th day of May, 1944, did [fol. 20] return its answer to said special interrogatory, submitted as aforesaid, and did return its verdict in favor of the plaintiff, Cecil I. Hust, and against the defendant, Moore-McCormack Lines, Inc., a corporation, which said answer to said interrogatory and said verdict were received by the Court and are now on file with the clerk of the above entitled Court as a part of the records in this cause, said

answer to said special interrogatory and said verdict being in words and figures as follows:

> We, the jury, impaneled and sworn to try the above-entitled cause, do answer the Interrogatory submitted to us by the Court as follows:
>
> Interrogatory: Was the plaintiff, Cecil I. Hust, at the time he sustained his injuries, on the 17th day of March, 1943, an employee of Moore-McCormack Lines, Inc., a corporation?
>
> Answer: (Yes, or No) Yes.
>
> (Signed) Victor J. Dyck, Foreman.

> We, the jury, duly impaneled and sworn to try the above entitled civil action, do find our verdict as follows:
>
> We find that Cecil I. Hust, the plaintiff herein, was an employee of Moore-McCormack Lines, Inc., a corporation, defendant herein, on the 17th day of March, 1943, and that the said plaintiff sustained injuries in the course of his employment with said defendant company on the said 17th day of March, 1943.
>
> We do further find our verdict in favor of the plaintiff, Cecil I. Hust, and against the defendant, Moore-McCormack Lines, Inc., a corporation, and assess plaintiff's damages in the sum of $35,000.00.
>
> Dated this 17th day of May, 1944.
>
> (Signed) Victor J. Dyck, Foreman.

Now therefore, based upon said verdict, the Court does hereby enter its judgment herein in favor of the plaintiff, [fol. 21] Cecil I. Hust, and against the defendant, Moore-McCormack Lines, Inc., a corporation, for the full sum of Thirty-five Thousand ($35,000.00) Dollars, with interest thereon at the rate of 6% per annum from the date of the entry of this judgment, and for costs in the sum of $——, to be taxed, with interest thereon at the rate of 6% per annum from the date of the entry of this judgment, and that execution issue therefor.

Dated at Portland, Oregon, this 18 day of May, 1944.

Martin W. Hawkins, Judge.

[fol. 22] [File endorsement omitted]

IN THE CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

MOTION FOR A JUDGMENT NON OBSTANTE VEREDICTO—Filed May 20, 1944

Comes now the defendant, Moore McCormack Lines, Inc., a corporation, and moves for judgment in its favor notwithstanding the verdict rendered by the jury in the trial of this cause, and notwithstanding said verdict, moves that judgment be entered that plaintiff take nothing, and that defendant recover of and from plaintiff its costs and disbursements.

Dated this 18th day of May, 1944.

Wood, Matthiessen & Wood, Erskine Wood and Lofton L. Tatum, Attorneys for Defendant.

The ground of this motion is that a verdict for defendant should have been directed at the trial for the reasons then stated, and as then requested.

Wood, Matthiessen & Wood, Erskine Wood and Lofton L. Tatum, Attorneys for Defendant.

I hereby certify that the foregoing motion or demurrer is, in my opinion, well founded in law.

Lofton L. Tatum, of attorneys for defendant.

Service of the foregoing, by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on this 20 day of May 1944, is hereby admitted.

Edwin D. Hicks, by E. Gaynean, of attorneys for Plaintiff.

[fol. 23] IN THE CIRCUIT COURT OF MULTNOMAH COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed July 12, 1944

To Cecil I. Hust and Green and Landye, B. A. Green and Edwin D. Hicks, his attorneys:

You, and each of you, are hereby notified that in the above entitled cause of Cecil I. Hust, Plaintiff vs. Moore-Mc-

Cormack Lines, Inc., a corporation, Defendant, in the Circuit Court of the State of Oregon for the County of Multnomah an appeal is taken by defendant, Moore-McCormack Lines, Inc., to the Supreme Court of the State of Oregon from the Judgment for Thirty-five Thousand Dollars ($35,000), with interest and costs, in favor of plaintiff and against defendant, entered in this court and cause the 18th day of May, 1944; and, also from the order denying defendant's motion for a new trial entered in this court and cause the 6th day of July, 1944.

Dated July 12th, 1944.

Wood Matthiessen & Wood; Erskine Wood & Lofton L. Tatum, Attorneys for Defendant.

[fol. 24] Service of the foregoing notice accepted this 12th day of July, 1944.

Green & Landye, by B. A. Green; Edwin D. Hicks, Attorneys for Plaintiff.

[fols. 25-26] Bond on Appeal filed July 14, 1944, omitted in printing.

[fol. 27] IN SUPREME COURT OF OREGON

APPELLANT'S ASSIGNMENTS OF ERROR
(Page 10 Appellant's Brief)

First Assignment of Error

The Court erred in denying defendant's motion for a directed verdict; and in refusing defendant's requested instruction to the same effect; and in not entering a judgment notwithstanding the verdict.

Second Assignment of Error

This assignment is the same as the First, i. e., the Court erred in not directing a verdict for defendant, etc.; but it rests on a different ground, to-wit, there was no evidence connecting defendant with the cause of the injury.

Third Assignment of Error

The Court erred in failing to order a new trial or require plaintiff to file a remittitur on the ground that the verdict for $35,000.00 was excessive.

[fol. 28] IN THE SUPREME COURT OF OREGON

CECIL I. HUST, Respondent,

v.

MOORE-McCORMACK LINES, INC., a Corporation, Appellant

Appeal from the Circuit Court for Multnomah County.

Honorable Martin W. Hawkins, Judge.

Argued and submitted March 6, 1945.

Erskine Wood, of Portland, (with Wood, Matthiessen & Wood and Lofton L. Tatum, of Portland, on brief) for Appellant.

Edwin D. Hicks, of Portland, (with Green & Landye and B. A. Green, of Portland, on brief) for Respondent.

Before Belt, Chief Justice, and Rossman, Kelley, Bailey, Lusk, Brand and Hay, Justices.

LUSK, J.

Reversed.

OPINION

[fol. 29] LUSK, J.

The plaintiff was injured on March 9, 1943, while discharging his duties as a seaman on the S. S. Mark Hanna, a "liberty ship" owned by the United States, for which the defendant Moore-McCormack Lines, Inc., was general agent under a "service agreement" designated GAA 4-4-42. The defendant is a Delaware corporation with offices in Portland, Oregon. The accident occurred after the vessel had been torpedoed in the Atlantic Ocean and was being towed to port. The plaintiff was ordered to go to the ship's locker in the forepeak and bring out a mooring line. While crossing the locker room in search of the rope he fell

through an uncovered hatch to a lower deck. He brought this action for damages under § 33 of the Merchant Marine, or Jones Act, 41 Stat. 1007, 46 U. S. C. A. § 688, alleging that at the time of the accident the defendant was operating the vessel and he was in the defendant's employ, and that his injury was caused by the negligence of the defendant in failing to provide any light for the locker room and compelling him to carry on his work in total darkness and in failing to maintain the guard chain around the hatch through which he fell. The case was tried to a jury which brought in a verdict for the plaintiff for $35,000.00.

On the trial the defendant moved for a directed verdict on the grounds that the evidence showed that the plaintiff was not employed by it and that his injury was not caused by its negligence. The court denied the motion, and in its charge left it to the jury to determine as a question of fact whether the relation of employer and employee existed between defendant and plaintiff. The court likewise denied a motion for judgment for the defendant notwithstanding the verdict. On this appeal these rulings are assigned as error.

The rights and remedies afforded by the Jones Act are not available to the plaintiff unless he was in the employ of the defendant at the time he was injured. Nolan v. General Seafoods Corp., 112 F. (2d) 515, 517; The Norland, 101 F. [fol. 30] (2d) 967, 971. The defendant contends that the plaintiff was not its employee; that, under the terms of the service agreement, it had no authority over the hiring of the crew further than to procure the master, who was the agent and employee of the United States, and to make available to the master, officers and men, for engagement by him on behalf of the United States; and that, in fact, at the time of the accident it did not operate or have control of the vessel.

The agreement, dated October 19, 1941, is between the United States, acting by and through the administrator, War Shipping Administration, and Moore-McCormack Lines, Inc., therein referred to as the general agent. By its terms the United States appoints the defendant as its agent and not as an independent contractor, "to manage and conduct the business of vessels assigned to it by the United States from time to time", and the agent accepts the appointment and undertakes so to manage and conduct the business for the United States under the latter's direction

of such vessels as may have been or may be by the United States assigned to and accepted by the general agent for that purpose.

By Article 3A the agent agrees to (a) "Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyages * * *"; (b) "Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same * * *"; and to (c) "Equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe".

Article 3A (d) is as follows:

> "The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with [fol. 31] respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

Article 5. "At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine * * *."

By Article 7 the United States agrees, with certain exceptions, to reimburse the General Agent "for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equip-

ment as required hereunder", and "to the extent not recovered from insurance" to "reimburse the General Agent for all crew expenditures * * * including * * * all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness * * *."

Article 8. "The United States shall, without cost or expense to the General Agent, procure or provide insurance against all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder (which insurance shall include the General Agent and the vessel personnel as assureds) including, but without limitation, marine, war and P. & I. risks, and all other risks or liabilities for breach of statute and for damage caused to other vessels, persons or property, and shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance. The General Agent shall furnish reports and information and comply fully with all instructions that may be issued with regard to all salvage claims, damages, losses or other claims * * *."

[fol. 32] Article 14. "The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and including maintenance and voyage repairs and replacements for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and

shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable."

Article 16. (a) "The United States shall indemnify and hold harmless and defend the General Agent against any and all claims and demands * * * of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder * * *."

There is no evidence that the defendant did anything in connection with the business of the vessel not contemplated by the terms of the service agreement, or that it exercised or attempted to exercise any control over the master or crew. Indeed, the uncontradicted evidence is that when it was the duty of the defendant to assist in the loading of the vessel it acted under the instructions of the master as to the time, place and method of loading. And, although under the service agreement the defendant might have been required to arrange for the repair of the vessel, it never did so, but this duty was discharged by a division of the War Shipping Administration.

In accordance with the terms of the service agreement, and as well of collective bargaining agreements between the defendant and the various maritime unions, the crew were procured by the defendant's Portland office through the union hiring halls. The men were sent to the vessel and accepted or rejected by the master, and those who were ac- [fol. 33] cepted signed the shipping articles which constitute the contract between the master and the seaman. The articles on their face designate War Shipping Administration, Washington, D. C., as owner of the Mark Hanna and Moore-McCormack Lines, Inc., 5 Broadway, New York, New York, as general agents. The articles are signed as well by a deputy shipping commissioner, who did not testify. But the United States shipping commissioner at Portland, Commander Jones, testified that the regular practice and requirement is for the shipping commissioner or his deputy, who presides over the signing of shipping articles, to read them aloud to the crew.

We think it must be assumed in determining whether the plaintiff was an employee of the defendant that the case is governed by the rule of the common law. There has been no suggestion to the contrary, except the plaintiff's contention that the Act of Congress (Public Law 17—78th Congress) 50 U. S. C. A. Append., § 1291, and known as the War Shipping Administration (Clarification) Act of March 24, 1943, is controlling. Of that we shall speak later. The familiar and well established test of whether one is an employee of another is whether the latter has the right to order, direct and control the former in the performance of the work, and the elements to be considered on that question are the selection and engagement of the servant, the payment of wages, and the power of dismissal. 35 Am. Jur., Master and Servant, 445, 446, § 3. See, Journal Publishing Co. v. State Unemployment Compensation Commission, —— Or. ——, 155 F. (2d) 570, 585. By the terms of the service agreement the defendant was authorized, not to employ, but to procure the master, and it is expressly provided that the master "shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel." The defendant was further authorized to "procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel.". Master, officers and men were to be "paid in the customary manner with funds [fol. 34] provided by the United States hereunder." This language requires no emendation. It speaks plainly of the intention of the United States to reserve to itself complete control of the vessel's crew through its agent and employee, the master. No room is left for the motion that the defendant had authority to discharge the master or any officer or member of the crew. But the plaintiff argues that the language does not imply an exclusive agency, that "one employee may serve many masters at the same time." The latter statement is doubtless true. Where there are several owners of a vessel, for example, the master may be agent for all. But here, of course, is no question of dual ownership, and we think the language employed does not admit of the construction that the master is subject to the control of any one else than the United States. And, since the crew "shall be subject only to the orders of the Master," their

status as employees of the United States, and of no one else, necessarily follows.

Counsel for the parties have cited no cases, and we have found none, in which the courts have interpreted a stipulation such as that we are now considering in an agreement of this character. But in cases involving charter parties, where the question is whether there has been a demise of the vessel or a mere contract of affreightment, the courts hold that provisions designating the master and mariners as servants of the owner are inconsistent with a construction of the charter party as a demise of the vessel, with resulting right of control and navigation in the charterer rather than the owner. Pacific Improvement Co. v. Schubach-Hamilton S. S. Co., 214 F. 854; Warner Quinlan Asphalt Co. v. The King. (1924) Can. S. C. 236, (1924) 2 D. L. R. 853; Adams v. Homeyer, 45 Mo. 545, 100 Am. Dec. 391; Deniff v. Charles R. McCormick & Co., 105 Or. 697, 705, 210 P. 703; Multnomah Co. v. Willamette Towing Co., 49 Or. 204, 215, 89 P. 369; Grimberg v. Columbia Packers' Assoc., 47 Or. 257, 270, 83 P. 194; 58 C. J., Shipping, 159, § 226. [fol. 35] While it is true that in construing charter parties the presumption is against a demise of the vessel, we think that the analogy of these cases is manifest, and that, if in a charter party a provision to the effect that the master and crew are to be employees of the owner of the vessel means that they are not the employees of the charterer, no different effect should be given to a like provision in the agreement here. To hold otherwise would be, in our opinion, to ignore the clearly expressed intention of the parties that there should not be a divided control of the vessel, its master and crew. The agreement was made in time of war; the vessels operated under it were and still are, as we judicially know, practically in the military service of the United States; and it is not to be supposed that in those circumstances the War Shipping Administration contemplated anything less than that they should be under the complete and exclusive control of the United States.

To support their contention counsel for the plaintiff point to the following provisions in the service agreement: Article 2. The defendant agrees as "General Agent * * * to manage and conduct the business (of the vessels) for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe * * *." Article 3A (c). The de-

fendant agrees "to equip, victual, supply and maintain the vessels." Article 14. The defendant agrees "unless otherwise instructed," to "arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition," and to "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States [fol. 36] from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained * * *."

It is argued that when the plaintiff, in obedience to the boatswain's order, went to the locker room to get a mooring line to be used in place of the one that had broken he was aiding in making a replacement and thus performing a duty of the defendant under Article 14 of the agreement.

We think that this is not an admissible deduction. In the first place a significant difference is to be noted between Article 3A (c) and the similar provision in the contract involved in Brady v. Roosevelt S. S. Co., 317 U. S. 575, 87 L. Ed. 471, 63 S. Ct. 425. That case is the main reliance of the plaintiff, and will be fully considered later. At this point it is sufficient to say that the Supreme Court sustained liability in an action for wrongful death against the private operator of a vessel owned by the United States Maritime Commission. But in that case the agent agreed to "man" and "operate the vessels," while, under the agreement here, the defendant does not agree to do either. Again in the Brady case the agreement with respect to repairs was that the agent should "exercise reasonable care and diligence to maintain the vessels in a thoroughly efficient state of repair, etc.", while, under the agreement in the present case, the agent was required to "arrange for the repair of the vessels," etc. Referring to the Brady case and to Quinn v. Southgate Nelson Corp., 121 F. (2d) 190, Judge Knox, of the District Court, S. D. N. Y., in the case of Lewis v. U. S. Nav. Co., Inc., 57 F. Supp. 652, said: "In each of these cases the agent was required not only to victual, supply and manage the vessel, but to man it as well." He observed that the difference between the agreements in those cases and the agreement in the case before him (which ap-

pears to have been identical with the one here under consideration) was intentional, and said: "Unless, therefore, the plaintiff was unaware that defendant, in servicing the [fol. 37] ship, was acting as an agent of the United States and was without any authority over the vessel once she was on her way abroad, and thus has a right of action by reason of defendant's failure to disclose its principal, I hardly see how he can recover." The court found that such disclosure had not been made, and for that reason that the defendant agent was liable.

The intention of the parties to the agreement must be derived from a consideration of its terms as a whole. Grimberg v. Columbia Packers' Assoc., supra; Warner Quinlan Asphalt Co. v. The King, supra. But, to give the language pointed to by the plaintiff the effect claimed for it, would be to ignore other provisions and nullify them. The construction insisted upon is wholly inconsistent with Article 3A (d), and, in view of that subdivision, the only conclusion consistent with fundamental principles governing the interpretation of contracts is that the duties stipulated for in those sections relied on by the plaintiff were only such as could be performed by the defendant while the vessel is in port. The defendant did not engage to arrange for repairs and replacements when the vessel was on the ocean, for it had no servants or employees on the vessel to do this work. Its agreement "to equip, victual and supply" the vessel had no connection with its control and navigation, and does not suggest any right of control over the master and crew; while the word "maintain" in the same phrase no doubt should bear the meaning which it has in the context of Article 3A (a) where it is provided that the agent shall "maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyages, cargoes, etc." Much plainer and more explicit language indicating control of the vessel in the charterers is found in Pacific Improvement Co. v. Schubach-Hamilton S. S. Co., supra, but Judge Cushman, in view of other provisions, said concerning them:

> [fol. 38] "These provisions, so far as orders, directions, instructions, and control upon the part of the charterer are concerned contemplate such orders as the charterer sees fit to give in the matter of cargo, fuel, loading, unloading, the time of departure from ports,

the ports to be made, the order in which made, the wharves, or means to be used in loading or unloading, and similar directions concerning the voyage, and were, evidently, the only ones in contemplation."

Going beyond the terms of the agreement, the plaintiff contends that certain evidence in the record indicates the existence of an employer-employee relationship between the plaintiff and the defendant. This contention will now be considered.

(1) The defendant, in paying the crew of the vessel on behalf of the United States, used pay envelopes on which its own name was printed. The local manager of the defendant explained in his testimony that the envelopes were used as a matter of economy because they were on hand.

(2) The plaintiff was provided with a "crew-pass and muster card", on a printed form bearing the name of the defendant, but signed, apparently, by the chief mate of the vessel. It does not appear how the chief mate got possession of the crew-pass form, but, even though we should infer that the defendant permitted him to take it, there is nothing to show that its issuance was the act of the defendant.

(3) The defendant issued to a member of the crew a printed United States treasury form containing a statement of income tax withheld on the seaman's wages in which the defendant's name appears in print under the words "employer by whom paid". Under the terms of the service agreement the defendant was required to and did pay the crew their wages (being later reimbursed by the United States). For the purpose of the withholding tax the defendant is deemed an employer under the Internal Revenue Code of the United States (Internal Revenue Code § 1621, 26 U. S. C. A., § 1621).

(4) There was received in evidence a letter written by the local manager of the defendant to the plaintiff enclos- [fol. 39] ing copies of two other letters. One of these was from the acting assistant general counsel of the War Shipping Administration and was addressed to the defendant at its San Francisco office. The letter discusses the plaintiff's claim, expresses the opinion that his disability is not "compensable under the War Shipping Administration Crew Life and Injury Policy", and that it "is clearly a marine

risk and that, therefore, it is a matter to be taken up by you with your marine P. & I. underwriters." The other letter was written by H. W. Dubbin, claim agent of the defendant at San Francisco, to Mr. Tripp, its Portland manager, and says, among other things, in referring to the letter of the acting assistant general counsel of the War Shipping Administration: "This decision is somewhat questionable, nevertheless we will probably have to submit file to the Fulton Underwriting Agency." Before introducing this correspondence in evidence counsel for the plaintiff developed on the cross-examination of Mr. Tripp that the plaintiff had presented his claim to him and that he had referred the claim to Dubbin. The plaintiff argues that this evidence shows that the defendant considered the claim its own obligation, and in that connection calls attention to Article 16 (a) of the service agreement in which the United States agrees to indemnify the general agent against claims asserted for injury to persons or property arising out of the operation of the vessels. In our opinion the inference sought to be drawn is unwarranted. It is in no sense an admission of liability for an employee of a corporation to whom a claim is presented to refer the matter to another employee whose duty requires him to deal with claims. Nor did the defendant indicate that it deemed itself liable when it in turn, through its claim agent, referred the claim to the War Shipping Administration and later, on the latter's instruction, to its "marine P. & I. underwriters." By Article 8 of the service agreement the United States agreed to provide, without cost to the general agent, insurance [fol. 40] against all insurable risks, including P. & I. risks, relating to the vessels (the general agent to be among the assured). The article then provides: "The General Agent shall furnish reports and information and comply fully with all instructions that may be issued with regard to all salvage claims, damages, losses or other claims." It was therefore the duty of the defendant under its contract to refer the claim to its P. & I. underwriters in accordance with the instructions contained in the letter from the acting assistant general counsel of the War Shipping Administration.

There were received in evidence copies of collective bargaining agreements between the several maritime unions and various steamship companies, including the defendant, and copies of a "Statement of Policy" executed by union officials and the War Shipping Administration, together

with a copy of a regulation of the War Shipping Administration instructing all general agents to follow the policy outlined. The statement of policy to which the plaintiff's union (Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association) is a party is dated May 4, 1942, several months before the plaintiff signed shipping articles for the voyage on which he was injured. It sets forth Article 3 (d) of the service agreement, and declares that the intention of the clause is that the general agent will procure and make available to the master for engagement by the master officers and men through channels which the agent has heretofore used for his own merchant ships, for example, through union hiring halls if the general agent has contracts so providing. It is agreed that the existing collective bargaining agreements be frozen for the duration of the war. It is agreed that, in view of the need of the highest standard of order and discipline aboard ship in wartime the unions will cooperate with the War Shipping Administration in maintaining the authority of the master and eliminating crews' mass meetings, crews' committees, [fol. 41] and other similar meetings or groups; that disputes will be settled through the regular machinery in existence under the collective bargaining agreements between the unions and the steamship operators; and that the unions' right to strike will be withheld for the duration of the war. Another such statement of policy, dated May 4, 1942, with other unions, is of like tenor, with the exception that it is provided that the existing collective bargaining agreements be continued "unless changed by mutual agreement between the War Shipping Administration and the union". A third such statement of policy, dated May 12, 1942, between the National Maritime Union of America and the War Shipping Administration contains a like provision for modification of collective bargaining agreements. There was also received in evidence a letter dated May 8, 1942, signed by Edward Macauley, assistant to the administrator, War Shipping Administration, and addressed to Mr. Joseph Curran, president National Maritime Union of America, in response to a letter from Mr. Curran, and giving answers to a list of questions which Mr. Curran had submitted with reference mainly to the effect of the statement of policy on certain union practices and policies.

This evidence, in our opinion, constitutes recognition by the unions of the status as United States employees of sea-

men on vessels owned by the United States. The stipulation of Article 3(d) of the service agreement that "the Master shall be an agent and employee of the United States" was as effectually brought home to the plaintiff through his duly authorized representatives, the officials of his union, as though he had signed the statement of policy himself. There is implied approval of this stipulation. The union agreed with the War Shipping Administration to a change in the provisions of the collective bargaining agreements fixing their duration and to restrictions on the activities of the crews at sea not contained in those agreements. It cannot be said that in this matter the War Shipping Ad- [fol. 42] ministration was acting on behalf of the steamship companies. It was the other way around. The War Shipping Administration was the principal, the companies the agents; and, in effect, the War Shipping Administration took over the collective bargaining agreements, substituted itself as a party in the place of the steamship companies, and the unions acquiesced. House Report 107, which accompanied Public Law 17, 78th Congress, speaks of "the adoption of the collective bargaining agreements" by the Administrator (1943 A. M. C. 618).

As stated, the trial judge left to the jury the question of employer-employee relationship as one of fact. The propriety of that submission is not defended here, and it seems to be agreed by both parties that the question is one of law to be determined by the court. Of the correctness of this view we think there can be no doubt. The construction and effect of the service agreement are, of course, for the court. There is no issue of *de facto* control, and we think that nothing in the evidence affects the conclusion that under the service agreement the defendant was not authorized to employ the master or crew of the vessel or to exercise any authority over them or to assume any control over the vessel itself while at sea.

Plaintiff's reliance on Brady v. Roosevelt S. S. Co., supra, is in our opinion, not warranted. That case did not present the question whether a seaman was an employee of the defendant steamship company. It was not brought under the Jones Act, but was an action to recover damages for the death of a customs inspector resulting from injuries sustained while boarding a vessel owned by the United States Maritime Commission and operated for it under a contract covering that and other vessels. The accident

occurred in June, 1938, and was caused by the breaking of a rung of the ladder which the deceased was climbing. At the time of the injury the vessel was docked at a pier in New York City. Suit was brought in the New York Supreme Court and removed to the federal court.

We have already called attention to important differences in the contracts involved in the two cases, and to these we [fol. 43] should add that, so far as appears, the contract in the Brady case contains no provisions similar to those of Article 3A (d) of the service agreement here. There was no contention that the seamen on the vessel were employees of the United States. Apart from that, the questions for decision were totally different. This case turns on the defendant's contention that the plaintiff was not in its employ and that it did not commit the tort which caused the plaintiff's injury. In the Brady case the tort was assumed to be that of the defendant, and that matter was not an issue before the Supreme Court. The only question decided was upon the validity of the defendant's contention that the plaintiff's remedy was not against it, but against the United States or the Maritime Commission by libel *in personam*, because the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. §§ 741, 742) so provided, and because, as the defendant claimed, the Maritime Commission, under the terms of its contract with the agent, would ultimately have to pay the judgment and was therefore the real party in interest. The Circuit Court of Appeals had taken that view, relying on Emergency Fleet Corp. v. Lustgarten, 280 U. S. 320, 74 L. ed. 451, 50 S. Ct. 118, and ordered the complaint dismissed, 128 F. (2d) 169. But, on certiorari, the Supreme Court, in an opinion by Mr. Justice Douglas, reversed. The Lustgarten case was overruled, "so far as it would prevent a private operator from being sued under the circumstances of this case". The court said that "the agent, because he is agent, does not cease to be answerable for his torts", and that Congress did not intend, by passing the Suits in Admiralty Act, to withdraw the right to sue the agent for his torts. It was further held that, even assuming the existence of the asserted agreement for exoneration, if the plaintiff had a cause of action against the defendant "it is difficult to see how she could be deprived of it by reason of a contract" between defendant and the Maritime Commission. "The question", the [fol. 44] court said in distinguishing other cases, "is not

whether the Commission had authority to delegate to respondent responsibilities for managing and operating the vessel as its agent. It is whether respondent can escape liability for a negligent exercise of that delegated power if we assume that by contract it will be exonerated or indemnified for any damages it must pay."

It is apparent, therefore, that the Brady case does not touch the question with which we are here dealing and does not control our decision.

Before discussing decisions of the lower courts, we think it well to consider Public Law 17, 78th Congress, which, as we have said, the plaintiff asserts is controlling. Section 1 of the Act provides in part:

> "That (a) officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or reparation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. * * *
>
> "Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. * * *
>
> "When used in this subsection the term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration."

[fol. 45] It may first be observed that the fact that Congress considered it advisable to pass remedial legislation of this kind is itself an argument against the plaintiff's position that seamen "employed upon United States or foreign flag vessels as employees of the United

States through the War Shipping Administration" are also employees of general agents operating under Service Agreement GAA 4-4-42; for, if that be true, no legislation was necessary in order to enable such seamen to sue the agent for its torts, since they already had that right under the Jones Act. That is a conclusion which may safely be drawn from the decision in the Brady case, which was decided before Public Law 17 was passed, and was brought to the attention of the Congress in the report of the committee which accompanied the bill. House Report 107, 1943 A. M. C. 611.

It is our opinion, however, that it was not the purpose of Public Law 17 to give a remedy against steamship companies who are agents of the War Shipping Administration. Section 1 does not mention agents. The rights which it declares that seamen in the employ of the United States shall have are the rights "applicable to citizens of the United States employed as seamen on privately owned and operated American vessels." What are those rights under the Jones Act? Broadly speaking, they consist in the right of the seaman or his personal representative to sue the employer for negligence causing injury or death. But, since the agent under the service agreement in question is not the seaman's employer, and, since, indeed, the very law upon which the plaintiff relies deals in express terms with employees of the United States, it follows that the Act was not intended to create or declare rights or remedies against the agent. On the other hand, since the seamen are employees of the United States and are accorded by the Act the same rights they would have if privately employed, the clear purpose of Section 1 is to enable them to enforce rights given by the Jones Act against their em- [fol. 46] ployer, the United States, or the War Shipping Administration, "pursuant to the provisions of the Suits in Admiralty Act." If it be said that this right already exists it may be answered that this is true only if a vessel is a merchant vessel or a tug boat (46 U. S. C. A. § 742), and at least one of the purposes of Public Law 17 was to remove "confusion and inequities" resulting from this state of the law and other conditions. House Report 107, 1943 A. M. C. 617. This is made clear in the following passage from the House Report (1943 A. M. C. p. 616):

> "Seamen employed as Government employees on vessels owned by or bareboat-chartered to the War Ship-

ping Administration are sometimes precluded from enforcing against the United States the rights and benefits in case of death, injury, illness, detention, and so on that would be available to them if employed by private employers, except under the Suits in Admiralty Act. If they were private employees, rights to redress for death, injury, or illness could be prosecuted under the Jones Act and the general maritime law. These same rights may be asserted against the United States as the employer under the Suits in Admiralty Act providing the vessel involved is a merchant vessel. In case of public vessels the seamen must rely upon the Administrator's policy for compensation recognizing contractual liability which this legislation recognizes. Present-day operating conditions often make uncertain whether the vessel is a merchant or a public vessel. As a consequence the aforementioned rights of such seamen are frequently in doubt. In addition to these rights which, at times, are uncertain for the reasons mentioned, the seamen who are employees of the United States probably have rights under the United States Employees' Compensation Act in the event of injury or death. Such compensation benefits are not presently enjoyed by seamen under private employment. Thus vital differences in these rights are made to depend upon whether the seaman happens to be employed aboard a vessel time-chartered to the War Shipping Administration or owned by or bareboat-chartered to the War Shipping Administration. Since seamen constantly change from one vessel to another, their rights for death, injury, or illness also constantly change, depending upon the relationship of the War Shipping Administration to the vessel. This fluctuation and lack of uniformity of rights leads to dependency of vital rights upon chance with a result of confusion and inequities. The bill is designed to remove this confusion and these inequities."

[fol. 47] Other statements in the report leave the intention of Congress free from doubt. We quote from the report, the references being to 1943 A. M. C.:

"They (the seamen) will continue to have the right of indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel

appliances, and they (and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. Such seamen will have the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act" (p. 606).

"They are not to be covered under the United States Employees' Compensation Act because they and their dependents have the right to sue for indemnity or damages under the Jones Act in case of death or injury" (p. 607).

"Except in rare cases the ships themselves are being operated as merchant vessels, and are therefore subject to the Suits in Admiralty Act. Granting seamen rights to sue under that act is therefore entirely consistent with the underlying pattern of the measure" (p. 607).

"Under section 1 officers and members of crews employed on vessels by or on behalf of the United States through the War Shipping Administration are, for the purpose of determination of the rights and benefits of such seamen and their dependents or beneficiaries, referred to those provisions of statutory and general maritime law which are applicable to seamen in private employment" (p. 621).

"The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully set forth hereinabove. Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. *The only modification thereof* arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. *This procedure is appropriate in view of the fact that the suits will be against the Government of the United States*" (p. 623; italics added).

Counsel for the plaintiff call attention to other passages from the report which are claimed to support their construction of the Act. Considered apart from the context, some of [fol. 48] the language used seems to carry that interpretation. But, when the report is read in its entirety, and, in view of the repeated statements of the committee, as well as

the express provision of Section 1 itself, that the rights granted are to be enforced according to the Suits in Admiralty Act, a different conclusion is compelled. We will consider, for example, a portion of the report (1943 A. M. C. 620) quoted in the brief of plaintiff, with emphasis upon the following sentence:

> "All of these rights for which court action lies, although maritime in nature, may be enforced either in Federal or State courts."

This is followed by a statement of the nature of the seaman's rights and remedies under the Jones Act, and the final sentence quoted by counsel reads:

> "In addition to these peacetime remedial provisions, additional benefits for war conditions are now provided to all seamen whether private or Government employees under the decisions of the Maritime War Emergency Board."

We think that counsel's reliance on this language arises from the failure to take note of the particular phase of the subject which the committee was considering in this portion of the report. The committee was not there engaged in an interpretation or explanation of the meaning of, or objects sought to be achieved by, Section 1 of the Act. On the contrary, the language quoted by counsel is part of a discussion of the rights under existing law of a seaman *privately employed*—the right to maintenance and cure, wages, food and lodging, hospitalization, etc. This is made entirely clear by the sentence immediately preceding the language quoted in the brief. It reads:

> "A seaman *privately employed* is also entitled to indemnity for injury sustained by reason of the unseaworthiness of the ship or a defect in her appliances or equipment" (italics added).

It is apparent that in this section of the report the committee was enumerating the rights under existing law of [fol. 49] seamen in private employment (as well as certain remedial wartime policies which the War Shipping Administration had put into effect) as a background for the explanation of the purposes intended to be accomplished by the proposed legislation, which follows under the heading

"The Provisions of Section 1" (p. 621). And it is in reference to these matters that the committee used the language above quoted by us:

> "The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully set forth hereinabove" (p. 623).

In a word, the committee said in effect:

> "These are the rights which seamen privately employed now have. Our purpose is to give the same rights to seamen employed by the United States, to be enforced against the United States through the procedure of the Suits in Admiralty Act."

An additional reason for the view we take is the retroactive provision of Public Law 17. Congress might well by statute provide a remedy against the United States and make it available in the case of an injury occurring before the statute was enacted; but it is difficult to believe that Congress would undertake to create a retroactive liability against private individuals or corporations. See 2 Cooley's Constitutional Limitations (8th ed.) 770; 16 C. J. S., Constitutional Law, 861, § 417. We can find no such intention expressed or implied in Section 1 of Public Law 17.

The fact that Section 1 of the Act does not deal with the liability of agents is further indicated by the following passage from the report:

> "Subsection (j) of section 3 would make it clear beyond controversy that the War Risk Insurance Act includes authority to provide insurance protection for agent operators as well as owners or charterers of vessels. The recent determination of the Supreme Court of the United States in Margaret M. Brady vs. Roosevelt Steamship Company, Inc. (1943 A. M. C. 1), holds that there is such an independent liability in certain cases." (1943 A. M. C. 611)

[fol. 50] The clear implication of the foregoing is that the committee was content to leave the matter of agents' liability to the courts.

We do not mean to suggest that the purpose of the law was to grant to agents immunity from suit for their own

torts, but simply that it leaves the question of the agents' liability untouched. It does not purport to create between the seamen and general agents of the War Shipping Administration a relationship of employer and employee, which, but for the Act, would not exist, nor to impose upon such agents liability for a tort which they did not commit. The whole purpose and intent of Section 1, in our opinion, was to create and declare in favor of seamen employed by the United States rights and remedies against the United States.

In addition to the Brady case, counsel for the plaintiff have cited Gay v. Pope & Talbot, Inc., 47 N. Y. S. (2d) 16, 1944 A. M. C. 855 (March 6, 1944); McCormick v. Moore-McCormack Lines, Inc., 54 F. Supp. 399, 1943 A. M. C. 1422, D. C. E. D. Pa.; Schaller v. Matson Navigation Co., 43 N. Y. S. (2d) 566, City Ct. of N. Y., Special Term; and Lewis v. N. S. Nav. Co., supra.

The Gay case was an action by a seamen to recover damages for personal injuries under the Jones Act against a general agent operating under the same form of contract as that involved in this case. The grounds of negligence are not stated in the opinion. The case came before the court on defendant's motion to dismiss the complaint based on the claim that Public Law 17 provides an exclusive remedy against the United States. The court denied the motion, held that the remedy provided by Public Law 17 is not exclusive, and that, under the Brady case, the agent is liable for its own torts. With these conclusions we are in accord, but, for reasons already stated, we do not agree with the implication of the decision that the seaman was an employee of the agent and entitled to sue under the Jones Act.

[fol. 51] In the Shaller case there is a very brief opinion denying a motion to dismiss. The court said that "it is conceded that the defendant is the owner of the vessel upon which plaintiff was employed", and that, although the defendant "operates the vessel in behalf of the United States Government under a general agency agreement, it is subject to suit, under the Jones Act, for its torts" (citing the Brady case). The concession referred to would seem to distinguish the case.

Three cases are reported under the title, McCormick v. Moore-McCormack Lines, Inc., supra. They were actions to

recover for personal injuries, for maintenance and cure, and for War Risk Insurance benefits. On a motion for summary judgment the court held that under the Brady case the seaman had a right of action against the agent for its torts, and, in the discussion of the plaintiff's claim for maintenance and cure, said that "even under the general agency agreement the operator became owner *pro hac vice* and accordingly became subject to the same liability."

None of these cases refers to the provisions of the agency agreement that the master shall be an employee and agent of the United States, and all seem to proceed upon the theory that, because the Supreme Court has held that an agent may be liable for its own torts, notwithstanding the provisions of the Suits in Admiralty Act, every agent, irrespective of the terms of the agency agreement and of the relationship between the agent and the crew of a vessel of the United States, is liable for personal injury to a seaman sustained aboard the vessel and caused by the negligence of someone. As we have already indicated at some length, we are unable to accept this view.

We have discussed the Lewis case. The special ground on which the court sustained liability there is not present here, and the opinion of the court indicates that, but for the element of undisclosed agency, a different decision would have been rendered.

[fol. 52] We should also mention Carroll v. United States, 133 F. (2d) 690, C. C. A. 2d, decided February 9, 1943, after the decision in the Brady case. This was a libel in the United States District Court by a seaman against the United States and The Waterman S. S. Agency, Ltd., for personal injuries suffered by the libellant while a steward on board the S. S. "Gallant Fox", owned by the United States and operated by the agency under the Panamanian flag. The accident occurred December 4, 1941. The libel was filed under the Suits in Admiralty Act, also under the Jones Act and general maritime law. The opinion shows that the contract between the United States and the agent was not before the court. The court held that since the decision in the Brady case the libellant could sue the agency under the Jones Act. The questions involved in the instant case were not discussed and do not appear to have been involved.

See, also, Burkholder v. United States, 56 F. Supp. 106, 1944 A. M. C. 944, D. C. E. D. Penn. (June 9, 1944), a libel in personam against the United States and the agent, the

owner of the vessel, which was chartered to the United States. The question of the agent's liability, however, was not discussed.

We turn now to decisions which sustain the defendant's position. Murray v. American Export Lines, Inc., 53 F. Supp. 861, D. C. S. D. N. Y. (December 10, 1943), holds, in a Jones Act case, that the agent is not liable for the negligence of a seaman who was a fellow servant of the plaintiff. This conclusion was reached after a consideration of the material differences between the service agreement, GAA 4-4-42, and the agency contracts involved in the Brady case and Quinn v. Southgate Nelson Corp., supra. Some of these differences we have already pointed out, but, in addition, the court (which had before it copies of the agreements in those cases) called attention to their provi- [fol. 53] sion that "any agents selected or appointed by the Managing Agent shall be solely the agents of said Managing Agent and not, in any respect, the agents of the Owner". Referring to the statement in the Brady case that "the rights of principal and agent inter se are not the measure of the rights of third persons against either of them for their torts", the court said:

> "While the last-quoted sentence is true, nevertheless the contract between principal and agent may show who is in control of the operation of the vessel, whose orders the members of the crew are required to obey and who is their employer. From all this it is possible to conclude who is liable if a member of the crew negligently injures a fellow crew member."

The court concluded:

> "Plaintiff does not claim that the injury to plaintiff was due to any defect in machinery or appliance or to any failure of defendant to inspect the vessel or to arrange for the proper maintenance of the vessel. The negligence alleged is that of a fellow member of the crew, over whom the defendant exercised no direction or control. It is clear that the negligence of the crew member, if any, is chargeable to the United States."

Pedersen v. Stockard S. S. Corp., 51 N. Y. S. (2d) 675, — App. Div. —, 1945 A. M. C. 23 (December 6, 1944), an action by a longshoreman to recover damages for personal

injury sustained while handling cargo, follows the decision in the Murray case, and holds that, if the accident happened not because of defective appliances but because of negligence of the crew, the defendant agent was not responsible.

Baker v. Moore-McCormack Lines, Inc., 57 F. Supp. 207, D. C. N. D. Cal., S. D. (September 29, 1944), is an opinion on motion to remand in a Jones Act case brought in the state court and removed to the federal court. The motion was denied because the agent was not the employer of the seaman and the prohibition against removal in the Jones Act was therefore not applicable. The court said:

> [fol. 54] "If plaintiff wishes to follow the Jones Act against his employer, the United States, he may do so under certain conditions pursuant to the provisions of the Suits in Admiralty Act, 46 U. S. C. A. § 741 et seq., and by virtue of Public Law 17, 50 U. S. C. A. Appendix § 1291, irrespective of whether the vessel is a merchant vessel or a public vessel. However, the suit against defendant Moore-McCormack Lines, Inc., cannot be under the Jones Act, inasmuch as the defendant did not man the vessel and was not plaintiff's employer."

Conlon v. Hammond Shipping Company Ltd., 55 F. Supp. 635, 1944 A. M. C. 443, D. C. N. D. Cal., S. D. (January 8, 1944), was a libel by a seaman for wages, maintenance and cure, against a general agent. The court rendered a brief opinion on exceptions to the libel, as follows:

> "Respondent, being neither the owner (nor owner *pro hac vice*) nor master of the vessel in which libellant served as seaman, is not suable in Admiralty for wages, maintenance or cure. Everett vs. United States, 284 Fed. 203. By the 'Service Agreement' between the United States, as owner, and respondent, as 'General Agent', respondent was the agent of the United States. Murray vs. American Export Lines, Inc. (S. D. N. Y.), Civil 21-401, 1943 A. M. C. 1426.
>
> "The Suits in Admiralty Act (46 U. S. C., sec. 741 et seq.), affords libellant adequate remedy against the owner of the vessel."

See, also, Militano v. United States, 55 F. Supp. 904, 1944 A. M. C. 1250, D. C. S. D. N. Y. (December 3, 1943); Neilsen

v. American President Lines, Ltd., 1944 A. M. C. 1169, S. Ct. N. Y., N. Y. County, 50 N. Y. S. (2d) 249 (August 23, 1944); Fox v. Alcoa S. S. Co., 143 F. (2d) 667, C. C. A. 5, 1944 A. M. C. 893 (July 7, 1944).

From this review of pertinent decisions it is apparent that there is no decided weight of authority on this important question, which ultimately must be determined by the Supreme Court of the United States. Those courts which would sustain liability in a case of this kind seem to us to have attached unwarranted implications to the decision in the Brady case. The opinion in that case is carefully [fol. 55] guarded, and the decision limited to the question whether a private operator may be sued "under the circumstances of this case" (317 U. S. 578). There is nothing, as we view it, to indicate that it should govern the rights of seamen in the employ of the United States on vessels owned by the United States. There may, of course, be circumstances under which the general agent for the War Shipping Administration would be liable to a seaman, or to others, as, for example, for injury resulting from negligence in failing to equip the vessel properly, or negligence in the selection of the master or a member of the crew. But that would not be because the seamen are in the employ of the agent, nor because of any general principle of liability arising from the fact of agency, but it would be because of the violation f a particular duty toward the injured person which the agent has assumed.

We find no such basis of liability in this case. The defendant was not responsible for a negligent order of the boatswain which sent the plaintiff into a place of danger. There is no evidence that the vessel was not properly equipped when it started on its voyage. It appears that the electric light bulb which usually lighted the locker room where the plaintiff was injured had burned out or been removed a short time prior to the accident, and that the guard chain used to protect the hatchway through which the plaintiff fell, had been removed a day or two before on order of the master. The defendant had no control over these events and no means of preventing their occurrence. As an agent whose duty it was merely to procure the master and crew for employment by the United States, it was not responsible for their conduct to the plaintiff (Restatement, Agency, § 79, comment a); and, since plaintiff was not an

employee of the defendant, he could in no event sue the defendant under the Jones Act.

One other contention of the plaintiff should be briefly noticed. The defendant in its answer admitted "that at the [fol. 56] time of the accident alleged it was operating the Liberty ship S. S. Mark Hanna for and on behalf of the United States of America, represented by the War Shipping Administration under a written Agency Agreement prescribing and limiting the duties, authority and functions of this defendant." This is said to be "express recognition that the crew were the agents" of the defendant. But the defendant denied allegations of the complaint that it managed or controlled the Mark Hanna and that plaintiff was employed by it. The defendant, therefore, cannot be said to have gone further than to admit operation of the vessel to the extent authorized by the agreement and to the exclusion of any control of the vessel or authority over the crew. Upon this theory of the meaning of the pleadings the case seems to have been tried.

For the reasons hereinabove stated the judgment is reversed and the cause remanded to the court below with directions to enter judgment for the defendant notwithstanding the verdict.

[fol. 57] IN SUPREME COURT OF OREGON

Appeal from Multnomah County

CECIL I. HUST, Respondent,

v.

MOORE-MCCORMACK LINES, INC., a Corporation, Appellant

JUDGMENT—April 24, 1945

This cause on March 6, 1945, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

It is therefore considered, ordered and adjudged that the judgment of the court below in this cause rendered and

entered be and the same is in all things reversed and set aside.

It is further ordered that appellant recover of and from respondent its costs and disbursements in this court taxed at $405.85.

It is further ordered that this cause be remanded to the court below from which the appeal was taken with directions to enter a judgment for the defendant, notwithstanding the verdict, and in accordance herewith.

[fol. 58] IN SUPREME COURT OF OREGON

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—June 29, 1945

This cause having heretofore been submitted on respondent's petition for a rehearing, and at this time the court being fully advised in the matter, it is ordered that said petition be and the same is hereby denied.

[fol. 59] [File endorsement omitted]

IN THE SUPREME COURT OF OREGON

[Title omitted]

PETITION FOR ORDER STAYING EXECUTION AND ENFORCEMENT OF JUDGMENT AND MANDATE TO ENABLE APPLICATION FOR WRIT OF CERTIORARI—Filed July 18, 1945

To the Honorable Harry H. Belt, Chief Justice of the Supreme Court of the State of Oregon or to George Rossman, the Acting Chief Justice thereof:

Your petitioner, Cecil I. Hust, plaintiff-respondent in the above entitled cause, respectfully presents this, his application for an order staying the execution and enforcement of the judgment of the above entitled Court and cause and staying the issuance of a mandate therein. This petition is filed pursuant to the provisions of Section 350 of Title 28 of the United States Code to enable said petitioner to apply for and obtain a writ of certiorari from the Su-

preme Court of the United States. The grounds upon which said petition for certiorari will be based will include assignments substantially as follows, among others:

1. That the above entitled cause is an action by plaintiff-respondent, a seaman, for damages for personal injuries received while employed by defendant-appellant aboard a ship operated by said defendant-appellant. Said cause was and is based upon Section 688 of Title 46, United States Code, commonly known as the "Jones Act", which provides further that such actions may be brought in state as well as in federal courts. By virtue of said action under said Act plaintiff-respondent thereby claimed the bene-[fol. 60] fit of rights, privileges and immunities under a statute of the United States within the meaning of Section 344 (b) of Title 28, United States Code.

2. That in appealing from the original judgment of the Circuit Court of the State of Oregon for Multnomah County, which recognized the right of plaintiff-respondent under said Jones Act to damages for said injuries, the defendant-appellant specifically recognized said cause as brought under said Jones Act, but contended that plaintiff was not employed by defendant, within the meaning of said Act, urging as reasons therefore an interpretation placed by defendant upon a certain contract by and between defendant-appellant and the War Shipping Administration.

3. That on said appeal plaintiff-respondent maintained and continued his position that under said Jones Act he was granted the right and privilege of maintaining an action against this defendant-appellant for said damages, that under said Act he was entitled to judgment therefor, that by virtue of Public Law 17, 50 U. S. C. A. App. Sec. 1291 it was made plain by Congress that such rights of seamen under the Jones Act were not destroyed by contracts such as entered into by defendant-appellant and the War Shipping Administration and that to hold to the contrary would be contrary to precedents established by the United States Supreme Court in the case of *Brady v. Roosevelt S. S. Co.*, 317 U. S. 3.

4. That in reaching its decision herein this Honorable Court specifically recognized that said suit was brought under said Jones Act and found it necessary to determine whether plaintiff was employed by defendant within the

meaning of said Act and in reaching its decision on this question also found it necessary to consider the meaning and effect of said contract between defendant-appellant and the War Shipping Administration in the light of the expressed intent of Congress in said Public Law 17 and in [fol. 61] the light of the decision of the United States Supreme Court in the case of *Brady v. Roosevelt S. S. Co.*, supra. It was specifically recognized by this Honorable Court that "there is no decided weight of authority on this important question, which ultimately must be determined by the Supreme Court of the United States."

5. Therefore, your petitioner will contend in his petition for certiorari that this Honorable Court, in denying recovery of damages under said Jones Act for personal injuries, thereby denied to said petitioner the benefit of rights and privileges specially set up and claimed under statutes of the United States within the meaning of Section 344 (b) of Title 28, United States Code.

The reasons why a stay is deemed necessary are that under the above mentioned judgment entered herein it is provided that defendant-appellant be allowed costs and disbursements in the amount of $405.85, and unless said judgment and mandate are stayed execution may be levied thereunder upon your petitioner.

Wherefore, petitioner prays that an order be issued staying execution and enforcement of the judgment of the above entitled Court and cause and staying the issuance of a mandate therein for a period of three months from the overruling of the petition for rehearing herein, to-wit: three months from the 29th day of June, 1945, and if said cause shall have been docketed in the Supreme Court of the United States within said time for the further period until final disposition thereof by the Supreme Court of the United States and respectfully asks that the security to be required of your petitioner therefore be now fixed by your Honor.

(S.) Green Landye, Green & Landye, B. A. Green, Edwin D. Hicks, Attorneys for Petitioner.

[fol. 62] I hereby certify that it is the bona fide intention of the plaintiff-respondent, Cecil I. Hust, to remove this case to the Supreme Court of the United States by appeal, or to make application to said court for a writ of certiorari, or do both, as he may be advised, within the next ninety

days, and that I believe there is merit in his case and that the judgment of the Supreme Court of the State of Oregon ought to be reversed by the Supreme Court of the United States.

(S.) Edwin D. Hicks, of Counsel for Petitioner.

Service of the within Petition and accompanying surety bond accepted this 17th day of July 1945.

(S.) Erskine Wood.

[fol. 63] [File endorsement omitted]

IN THE SUPREME COURT OF OREGON

[Title omitted]

ORDER STAYING EXECUTION AND ENFORCEMENT OF JUDGMENT AND MANDATE—Filed July 21, 1945

Upon application of Cecil I. Hust, plaintiff-respondent in the above entitled cause, by Edwin D. Hicks, one of his attorneys, for an order staying execution and enforcement of the judgment of the above entitled Court and cause and staying the issuance of a mandate therein to enable said petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and good cause therefor being shown; and petitioner having filed a good and sufficient undertaking, conditioned as required by law;

Now, Therefore, said undertaking in the amount of $1,000.00 is approved and it is ordered that the execution and enforcement of said judgment and the issuance of said mandate be and they are hereby stayed until the Supreme Court of the United States passes upon the petition to be made thereto in behalf of the plaintiff-respondent herein for a writ of certiorari, provided that application for said writ is made to the Supreme Court of the United States within three months from the 29th day of June, 1945.

Dated this 21 day of July, 1945.

(S.) George Rossman, Acting Chief Justice.

[fols. 64-66] Bond on application for certiorari for $1,000 approved and filed July 21, 1945, omitted in printing.

[fol. 67] [File endorsement omitted]

IN THE SUPREME COURT OF OREGON

[Title omitted]

STIPULATION FOR EXTENSION OF BOND ON APPLICATION FOR WRIT OF CERTIORARI—Filed October 1, 1945

The plaintiff-respondent herein, Cecil I. Hust, having previously filed herein a petition for an order staying execution and enforcement of the judgment and mandate herein to enable application for a writ of certiorari from the Supreme Court of the United States, accompanied by an undertaking upon the condition that if said Cecil I. Hust within three (3) months from the 29th day of June, 1945 makes application to the Supreme Court of the United States for such writ of certiorari and if he obtains an order granting said application and if he makes good his plea in the Supreme Court of the United States or if, failing therein, he makes payment of all said costs and damages, then the obligation is to be void, else to remain in full force and effect; and

An order having been entered herein on July 21, 1945 approving said undertaking and staying said execution and enforcement until the Supreme Court of the United States passes upon said petition for writ of certiorari, provided that application for said writ be made on or before September 29, 1945; and an order having been entered in the Supreme Court of the United States on September 17, 1945 extending the time for filing said petition to and including October 29, 1945, based upon petitioner's application alleging that the preparation of the record for review by the clerk of the Supreme Court of the State of Oregon had been unavoidably delayed due to the fact [fol. 68] that continued negotiations for the purpose of stipulating upon the portions of the record to be prepared for review had been interrupted by the sudden illness of Erskine Wood, attorney for defendant-appellant herein; and

The parties having stipulated that an order may be issued extending the stay of execution and enforcement of the judgment and mandate herein until said cause shall have been docketed in the Supreme Court of the United States and until disposition thereof by said court, provided that

application for said writ is made on or before October 29, 1945, or on or before such further date as may be ordered by the Supreme Court of the United States; and that the stipulation for extension of bond on application for writ of certiorari filed herewith be approved; and now, therefore,

It is hereby stipulated and agreed by and between the parties hereto and by and between said parties and the Fidelity & Deposit Company of Maryland, the surety for said undertaking and bond that said bond may be extended by amending the condition upon which said bond was issued to read as follows:

> "Now, therefore, the condition of the above undertaking is such that if Cecil I. Hust makes application to the Supreme Court of the United States for such writ of certiorari on or before October 29, 1945 or on or before such further date as may be ordered by the Supreme Court of the United States, and if he obtains an order granting said application and if he makes good his plea in the Supreme Court of the United States, or if failing therein, he makes payment of all said costs and damages, then the obligation is to be void, else to remain in full force and effect."

Dated this 29th day of September, 1945.

Cecil I. Hust, Principal and Plaintiff-Respondent, by (S.) Edwin D. Hicks, One of his attorneys.

[fol. 69] Fidelity and Deposit Company of Maryland, by (S.) Clarence D. Porter, Attorney in Fact.

Countersigned:

(S.) Clarence D. Porter, Resident Agent; Moore McCormack Lines, Inc., Defendant-Appellant, by Erskine Wood, One of its Attorneys. (Seal.)

Approved this 1st day of October 1945.

(S.) George Rossman, Justice.

[fol. 70] [File endorsement omitted]

IN THE SUPREME COURT OF OREGON

[Title omitted]

PETITION FOR EXTENSION OF ORDER STAYING EXECUTION AND ENFORCEMENT OF JUDGMENT AND MANDATE—Filed October 1, 1945

Your petitioner Cecil I. Hust, having previously filed herein a petition for an order staying execution and enforcement of the judgment and mandate herein to enable application for a writ of certiorari from the Supreme Court of the United States, accompanied by an undertaking therefore; an order having been entered herein on July 21, 1945 approving said undertaking and staying said execution and enforcement until the Supreme Court of the United States passes upon said petition for writ of certiorari, provided that application for said writ be made on or before September 29, 1945; and an order having been entered in the Supreme Court of the United States on September 17, 1945 extending the time for filing said petition to and including October 29, 1945, based upon petitioner's application alleging that the preparation of the record for review by the clerk of the Supreme Court of the State of Oregon had been unavoidably delayed due to the fact that continued negotiations for the purpose of stipulating upon the portions of the record to be prepared for review had been interrupted by the sudden illness of Erskine Wood, attorney for defendant-appellant herein;

[fol. 71] Wherefore, petitioner prays that an order be issued extendin- the stay of execution and enforcement of the judgment and mandate herein until said cause shall have been docketed in the Supreme Court of the United States and until disposition thereof by said court, provided that application for said writ is made on or before October 29, 1945, or on or before such further date as may be ordered by the Supreme Court of the United States; and that the stipulation for extension of bond on application for writ of certiorari filed herewith be approved.

(S.) Edwin D. Hicks, of Counsel for Petitioner.

Service of a verified copy of the within petition is hereby accepted this 29 day of September, 1945 and the requested extension is hereby stipulated to and agreed upon.

(S.) Erskine Wood, Of counsel for Respondent.

[fol. 72] IN THE SUPREME COURT OF OREGON

[Title omitted]

ORDER EXTENDING STAY OF EXECUTION AND ENFORCEMENT OF JUDGMENT AND MANDATE

Upon application of the plaintiff-respondent herein, by one of his attorneys, for an order extending the stay of execution and enforcement of the judgment and mandate herein to enable petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and good cause appearing therefore, and petitioner having filed a stipulation for the extension of the undertaking previously filed herein and approved:

Now, therefore, said stipulation for extension of bond on application for writ of certiorari is approved and it is ordered that the stay of the execution and enforcement of said judgment and the issuance of said mandate be and it is hereby extended until the Supreme Court of the United States passes upon the petition to be made thereto in behalf of the plaintiff-respondent herein for a writ of certiorari, provided that application for said writ is made to the Supreme Court of the United States on or before October 29, 1945 or until such further date as may be ordered by that Court.

Dated this 1st day of October, 1945.

George Rossman, Justice.

[fol. 72a] [File endorsements omitted]

IN THE CIRCUIT COURT OF MULTNOMAH COUNTY

No. 151,782

CECIL I. HUST, Plaintiff,

vs.

MOORE-MCCORMACK LINES, INC., a Corporation, Defendant

Proposed Bill of Exceptions, Presented July 12, 1944—Filed July 17, 1944

TO THE CLERK:

The above named defendant, Moore-McCormack Lines, Inc., herewith tenders a proposed bill of exceptions in the above entitled cause, consisting of a transcript of the whole

testimony and all the proceedings had at the trial including the exhibits offered and received or rejected, the instructions of the court to the jury, defendant's motion for a new trial and the courts order denying same, together with memorandum opinion referred to in said order. This bill of exceptions contains all the evidence, and a complete record of the trial.

(S.) Wood, Matthiessen & Wood, Erskine Wood, Attorney for Defendant.

Service of this Proposed Bill of Exceptions on July 12th, 1944, by delivery of a copy, is hereby admitted.

(S.) B. A. Green, of Attorneys for Defendant.

[fol. 72-b] In the Circuit Court of Multnomah County

[Title omitted]

Motion to Set Aside the Judgment and for a New Trial

Comes now the defendant and moves that the judgment entered in this cause be set aside and for a new trial on the ground and for the reason that the verdict is for excessive damages appearing to have been given under the influence of passion or prejudice.

In making this motion, the defendant does not waive the errors which it urged upon the Court in its motion for judgment notwithstanding the verdict.

Wood, Matthiessen & Wood, Erskine Wood and Lofton L. Tatum, Attorneys for Defendant.

[fol. 72-c] In the Circuit Court of Multnomah County

[Title omitted]

Order Denying Motions

Defendant's motion for Judgment non obstante Veredicto is hereby denied.

Defendant's motion for a new trial is also hereby denied.

Both motions are denied for the reasons stated in the Court's Memorandum Opinion, dated July 5, 1944, and filed this date.

Dated this 6th day of July, 1944.

(S.) Martin W. Hawkins, Judge.

[fol. 72d] MEMORANDUM OPINION ON MOTIONS

CIRCUIT COURT OF OREGON, FOURTH JUDICIAL DISTRICT, DEPARTMENT NO. 1

No. 151-782

Portland, Oregon, July 5, 1944.

Martin W. Hawkins, Judge

Wood, Matthiessen & Wood, Attorneys at Law, Yeon Building, Portland, Oregon; Green & Landye and Mr. Edwin D. Hicks, Atty's. at Law, Corbett Building, Portland, Oregon.

Re: Cecil I. Hust vs. Moore-McCormack Lines, Inc.

GENTLEMEN:

Since the entry of judgment in the above-entitled case defendant has filed Motion for a Judgment non obstante Veredicto, and a further Motion to set aside the Judgment and for a New Trial. In passing upon the Motion for a Judgment non obstante Veredicto I will again advise gentlemen of counsel that in view of the situation existing in other jurisdictions giving rise to diversity of opinions as to whether or not an action will lie against the steamship company under General Agency Agreements with the War Shipping Administration for the operation of vessels, I feel that an injustice would be done to the plaintiff were I to allow this sort of motion and have it reversed on appeal. I advised you at the time of trial and at the time of hearing of the motion as to how I felt about this matter, and I see no reason for assuming a different position at this time.

Regarding the Motion to set aside the judgment and for a New Trial, I have come to the conclusion, from a review of the authorities, that the state court in the trial of mari-

time cases has a right to, and does follow Federal procedure in matters of this sort. Federal courts have the power to grant a new trial for excessive damages. Federal courts also have the power to reduce the judgment to a proper figure and to require plaintiff to file a remittitur for the difference between the amount of the verdict and the amount deemed by the Court to be proper, and if plaintiff consents thereto and files a remittitur, the Court permits a judgment to be entered for the amount deemed to be proper. In the event the plaintiff refuses to follow the Court's suggestion, the Court then grants a new trial.

Were the Court to follow that procedure in this case, the primary question, that of liability, would not be settled except as the plaintiff would appeal from the Court's order granting a new trial. This would place the burden of expense of appealing upon the prevailing party in the trial court. This would hardly appear to be fair to the plaintiff under the existing circumstances. I do not feel that the Court has any power of authority to cut the verdict to an amount deemed to be proper, except as indicated above.

[fol. 72e] I have come to the conclusion that the damages re excessive and out of proportion to the plaintiff's injuries nd disabilities suffered, but do not feel inclined to require he plaintiff to file any remittitur in this case. I say this ecause I feel that the important and paramount question o be decided is as to whether or not liability exists against ne person who conducts the business of the vessel under is General Agency Agreement with the Government. If ne Supreme Court should feel that no liability exists, utting the verdict and requiring the filing of a remittitur ould solve no problem, for the plaintiff would then not be ntitled to recover in any sum. If I cut the amount to a um that I deem proper the plaintiff would have no right f appeal upon acceptance and the filing of a remittur. The defendant in such a case would still have its ght of appeal, and defendant has indicated to the Court nat were the Court to allow any substantial sum as damges, it would be obliged to appeal, in order to have the question of liability determined in this jurisdiction.

For the foregoing reasons, this motion is also denied. Counsel will prepare the necessary order.

Very truly yours, (S.) Martin W. Hawkins, Judge.

H:p.

[fol. 73] PLAINTIFF'S EVIDENCE

CECIL I. HUST, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hicks:

Q. Your name is Cecil Hust?
A. Cecil I. Hust.
Q. You are the plaintiff in this cause?
A. Yes, sir.
Q. Did you enter the Merchant Marine service, Mr. Hust, in the year 1942?
A. Yes, sir.
Q. Prior to that time had you presented yourself to the medical authorities of the military department of the Government for purposes of examination?
A. Yes, sir.
Q. And were you rejected for military service?
A. Yes, sir.

* * * * * * *

Q. And where did you go?
A. I went to the Shipping Commissioner here in town.
Q. Now, to your knowledge, what is the fact as to whether or not all crewmen of merchant vessels, regardless by whom they are owned, present themselves at the United States Shipping Commissioner's office for employment?
A. That is right.
Q. And that would be true of any vessel, regardless by whom operated in this particular service, is that right?
A. That is correct.
Q. And were you accepted for service aboard any particular vessel?
A. Yes, sir.
[fol. 74] Q. And by whom were you employed in that connection?
A. It was the James J. Griffith & Sons first.
Q. James J. Griffith & Sons?
A. Yes, sir.
Q. And were they operators of the Jonathan Edwards, a Liberty vessel?
A. Yes, sir.

Q. Where did you obtain that employment?

A. Right here in Portland.

Q. And you had one voyage aboard the Jonathan Edwards, did you, a liberty vessel?

A. Yes, sir.

Q. And in what capacity did you serve?

A. A wiper.

Q. How long did the voyage last aboard the Jonathan Edwards?

A. Three months.

Q. After that voyage was completed, did you undertake another voyage?

A. Yes, sir.

Q. By whom were you employed on that occasion?

A. Moore-McCormack.

Mr. Wood: I move to strike that answer. It is clearly improper. The witness has just said he has to be employed from the United States Shipping Commissioner's office in this formal way. Let him produce the written record.

The Court: Let him testify what was done in the matter of obtaining employment and so forth.

Q. All right, Mr. Hust. Please state what you did in respect to the Mark Hanna to obtain employment.

A. You go before the Shipping Commissioner and receive your papers.

[fol. 75] Q. Were certain papers given you on that occasion?

A. Yes, sir, my seaman's papers.

Q. And I assume that you signed what is known always as seamen's articles, did you?

A. Yes, sir.

* * * * * * *

Q. Mr. Hust, you stated you were furnished certain papers at the time you applied for employment aboard the Mark Hanna?

A. Yes, sir.

Q. Do you remember what papers were furnished you?

A. That is your certificate of identification and your ordinary seaman's papers and wipers papers.

Q. Were you afforded a crew pass and muster card?

A. Yes.

(Crew pass and muster card, dated Oct. 13, 1942, was marked Plaintiff's Exhibit 1 for Identification.)

Q. I hand you Plaintiff's Exhibit 1 for Identification and ask you to state what it is.

A. That is my crew pass and muster card.

Q. Was that issued to you while you were on the ship?

A. Yes, sir.

Q. And by whom was it issued?

A. The Captain.

Q. The Captain of the vessel?

A. Yes, sir.

Mr. Hicks: I offer this in evidence.

Mr. Wood: I object to it as incompetent, irrelevant and immaterial. I would like your Honor to look at it (handing the document to the Court).

[fol. 76] The Court: Is that on this ship?

A. It is on the Mark Hanna.

Mr. Hicks: On the Mark Hanna, furnished him when he went aboard the vessel, as he testified, the usual muster card.

The Court: This was at the beginning of your employment on this ship?

A. Yes, sir.

The Court: It will be received.

Mr. Wood: I would like an exception, your Honor.

The Court: Exception allowed.

(The crew pass and muster card, previously marked Plaintiff's Exhibit 1 for Ident., was received in Evidence.)

* * * * * * *

Q. Now, Mr. Hust, in respect to your service aboard the vessel Mark Hanna; Can you tell us by whom you were paid? I refer to your wages.

A. I was paid by Moore-McCormack.

Q. When you say Moore-McCormack, you mean Moore-McCormack Lines, the defendant in this case?

A. Yes, sir, that is right.

Q. Now, normally the crew members are paid off in cash, are they?

A. That is right.

Q. And by whom, or by what officer of the vessel were you paid from time to time?

A. I was paid by the Purser.

Q. And the Purser is one of the crew, is he?

A. That is right.

Q. And did you at any time receive payment of your wages in any other way than direct payment by the Purser? [fol. 77] A. Except as you draw in different ports, and the Purser usually hands those out.

Q. Was that payment made by way of money contained in envelopes?

A. Yes, sir, cash counted out to you.

Q. Counted out?

A. Yes.

Mr. Hicks: Will you mark these 2, a, b, c, for identification?

(Four pay envelopes were marked Plaintiff's Exhibits 2, 2-a, 2-b, and 2-c for Identification.)

Q. I hand you, Mr. Hust, Plaintiff's Exhibits 2, a, b, and c, consisting of four brown envelopes, and ask you to state, if you will, what those are and, if you received them, the occasion on which you received them.

A. Well, that is the envelope that your money is paid to you in, one for your overtime, one for your straight time, one for your bonus, etc., etc.

Q. Then the payments are segregated each time in that manner?

A. That is right.

Q. And each classification of your wage, your bonus or what not is contained in a separate envelope?

A. That is right.

Q. And these exhibits are simply envelopes which were given you, as I understand it, when such payment was made on one of the occasions?

A. That is right.

Mr. Hicks: I offer them in evidence.

Mr. Wood: I make the same objection, incompetent, irrelevant, and immaterial.

* * * * * * *

The Court: They will be received.

Mr. Wood: An exception.

The Court: Exception allowed.

[fol. 78] (The pay envelopes, previously marked Plaintiff's Exhibits 2, 2-a, 2-b, and 2-c For Identification, were received in evidence.)

Q. Now, Mr. Hust, aside from going to the office of the Shipping Commissioner, as seamen do when they undertake to obtain employment aboard any vessel, did you have any contact with the Government people who were representing themselves as operating the Mark Hanna?

A. No, sir, the Shipping Commissioner and the Captain.

Q. Now, do you know the name of the Captain?

A. Henry Hoeppner, I believe.

Q. You had occasion to meet him personally, did you, in connection with the voyage?

A. Yes, sir.

Q. Do you know what his address is?

A. I believe it was 200 Pine Street, San Francisco, was the address.

Q. Can you tell us whether or not that is the address of the Moore-McCormack Lines, Inc.—if you know?

A. Yes, sir, that is the address.

Q. Can you tell us whether that is the address, to your knowledge, which is used by the Captain in recording himself as Captain aboard the vessel?

A. Yes, sir, that is.

Q. Where did you ship from? I am referring to the Mark Hanna now.

[fol. 79] A. From Portland. We signed the Articles in Vancouver; went aboard in Portland and signed the Articles in Vancouver.

Q. Now just very briefly, where did this voyage take you?

A. From Portland to San Francisco; Suez, Egypt, and back around to Brazil, and we were on our way home at the time this happened.

Q. And throughout the voyage and up until March 17th were you serving as a member of the crew of the Mark Hanna?

A. Yes, sir.

Q. What were your duties as a crewman aboard the vessel?

A. I was a fireman and watertender.

Q. Just briefly, what did you do in exercising your job, performing your duties?

A. Well, you fire your boilers and keep your steam where the engineer wants it.

Q. And what shifts did you work?

A. Well, I was on the eight to twelve shift. You are on four hours and off eight. You go on in the morning at eight and off at twelve, and go on again at eight at night and off at twelve midnight. That is out at sea.

Q. Where aboard the ship would you perform those duties?

A. In the engine room.

Q. Did all your duties require you to work in the engine room?

A. Yes, sir.

Q. As a fireman, wiper, and so forth?

A. Yes, sir.

Q. Did you serve as both fireman and wiper aboard the Mark Hanna?

A. No, sir.

Q. As a fireman?

A. As a fireman.

[fol. 80]. Q. And all your duties under your employment before your injury related to fireman, as I understand it?

A. Yes, sir.

Q. You were aboard the Mark Hanna, serving as a member of its crew, were you, on the 9th day of March, 1943?

A. Yes, sir.

Q. Now tell us very briefly, Mr. Hust, without going into detail, what occurred on March 9th to your vessel.

A. Well, just a few minutes past two o'clock in the morning, March 9th——

Q. A little bit louder. We can hardly hear you back here.

A. Just a few minutes past two o'clock—past one o'clock, March 9th, we were attacked by submarines and our ship was torpedoed.

* * * * * * *

Q. Then there was a period of eight days elapsed from the time of torpedoing until the vessel reached the harbor of the Port of Spain?

A. That is right.

Q. During that eight-day period did the crew aboard the vessel, to your knowledge, perform their ordinary duties as crewmen?

A. Yes, sir.

Q. And did you?

A. Yes, sir.

Q. Served in the same location throughout the ship?

A. Yes, sir.

Q. On March 17th, and I refer to the morning of that day, did you receive any special orders as to a duty you should perform?

A. I received orders to go in the ship's locker in the forepeak and bring out a mooring line, a large mooring line.

Q. Now, prior to that had you been ordered to present yourself on deck.

A. No, sir.

[fol. 81] Q. You were on the main deck when you received the order?

A. Yes, sir.

Q. Can you tell us which of the officers gave the order?

A. Well, I am not positive. I think it was the Boatswain. The Boatswain and the Captain were both right there.

Q. How far away from you?

A. Well, I would say they were eight or ten feet. They were all right in the forepeak of the ship.

Q. The Boatswain and the Captain were right together?

A. Close together, yes, sir.

Q. At the time you and I presume Mr. Cameron received an order.

A. Yes, sir.

Q. Now tell us explicitly what the order was you received.

A. We received orders to go down in the locker and bring out a large mooring line for the purpose of towing the ship.

Q. Two of the crew were delegated to do that, were they?

A. That is right.

Q. Did you know what the locker room was?

A. I knew there was a locker there, yes.

Q. Had you ever been in it?

A. No, sir.

Q. Had you ever been in the locker room on any Liberty ship?

A. Not in that part of the ship, no, sir.

Q. Not in the fore part?

A. No, sir.

Q. Well, were you in any sense familiar with the layout of the locker room and how it was constructed?

A. No, sir.

[fol. 82] Q. After receiving that order, what did you and Mr. Cameron, the ordinary seaman, do?

A. We proceeded to go down——

The Court: (interrupting) Are you proceeding now to the matter of the injury?

Mr. Hicks: Yes.

The Court: I think this is a good place for adjournment. Court will adjourn until two o'clock this afternoon.

(Whereupon, at 12 o'clock, m., a recess was taken until 2:00 o'clock, p. m. of this day, Friday, May 12, 1944.)

Portland, Oregon, Friday, May 12, 1944, Two o'Clock, P. M.

Cecil I. Hust, the plaintiff, resumed the stand, and furtlier testified as follows:

Direct examination (Continued).

By Mr. Hicks:

Q. At the noon recess you had received the orders to proceed to the locker room and were proceeding to execute them. Will you state now to the jury in your own words what occurred, referring to the trip that you and Mr. Cameron made down into the locker room in response to the order given you by the Boatswain.

A. We had orders to go down for this mooring line, and Mr. Cameron went down first; I followed him, and there were no lights, it was dark in the——

Q. Speak out loud.

A. It was dark in the locker we were going into. The only light showing was from the open hatch, the small hatch we went down the vertical ladder, and the mooring line was back over in the corner, and I was following Mr. [fol. 83] Cameron, and he evidently knew the hole was there and stepped over it, and I stepped into it. The only thing I could see was to follow his outline as he was going back into the locker.

Q. Just describe a little more fully, if you will, the degree of darkness that was in the room.

A. Well, going from the outside into a dark room of that kind, it is pretty dark, and the only thing I could positively see was the outline of Mr. Cameron just ahead of me. I was trying to follow him, and he knew where the line was stored and just how to get back to it and everything; and it was absolutely pitch black back in the corner where we were at—where we were headed for.

Q. You said you went down a vertical ladder; I take it, from the main deck.

A. From the main deck down onto the second deck. We went down a vertical ladder and we had to go back in the storeroom approximately, I would say, ten feet to where the open hatch was.

Q. That would be ten feet across the floor of the second deck in the locker room?

A. That is right.

Q. From the point where the ladder comes down from the main deck?

A. That is right.

Q. Was there a hatch cover off the hatch or the hole leading from the main deck down to the locker room?

A. Yes, sir.

Q. Could you describe that for us?

A. Well, it is an oval-shape hatch cover, a small hatch, I would say it is about four-foot, and it has a water-tight cover that they can dog down when they are out in the rough seas.

Q. What was the position of the first deck hatch cover, that is, was it lying over flat on the ship or was it propped up, or what was it?

[fol. 84] A. It was opened up. They have a chain, I believe, that stops it, to keep it from going clear back.

Q. Do you remember what kind of a day it was?

A. It was a cloudy, dreary day.

Q. And this was about what time?

A. About seven or seven-thirty in the morning.

Q. Had you ever been in this locker room before?

A. No, sir.

Q. Could you tell us about how large a room it was?

A. I don't know exactly. I would say it is, well, it isn't square, it is the shape of the bow of the ship. It is right in the bow, is where it is at. I would say it is about 25 feet across at the widest place; it narrows down to a point.

Q. Had you ever been in a similar locker room aboard any other ship before?

A. No, sir.

Q. Now, did Mr. Cameron go down ahead of you,—I understand?

A. Pardon?

Q. Mr. Cameron went down ahead of you?

A. Yes, sir.

Q. Did he say anything to you at all when he got down into the locker room?

A. No, sir.

Q. Were you executing the order with any particular speed?

A. Well, not exactly what you would call speed, but when they give an order they expect you to carry it out right away.

Q. Were you able to see either the stanchions or this hole, or hatch, as we call it, in that room?

A. No, sir.

Q. Did you have anything at all to guide yourself by except this bare outline of Mr. Cameron as he proceeded ahead of you?

A. No, sir.

[fol. 85] Q. Would you tell us approximately how far it was from the second deck locker room down to the third deck into which you fell?

A. I would say it is approximately ten or twelve feet.

Q. You didn't measure it?

A. No, sir.

Q. That is an estimate on your part?

A. Yes, sir.

Q. Did you fall on any object at all in lighting on the floor of the third deck?

A. Yes, sir; there is a manhole cover there that is raised about five inches, four or five inches.

Q. When you say raised, you mean raised four or five inches above the floor?

A. That is right.

Q. And you fell on top of that?

A. Yes, sir.

Q. Would you tell the jury what part of your body struck first in the fall?

A. Well, I am not sure just how I hit, but I finished up by laying flat on my back, and I bumped my head, but I am not sure just how I did hit.

Q. You are not sure what position your body was in at the time you struck the floor?

A. No, I am not.

Q. You say you struck your head?

A. Yes, sir.

* * * * * * *

Q. There were no lights showing in the locker room at the time you went down there, as I understand?

A. No, sir.

Q. Were there any electric light facilities in that room at all; was it wired for electric globes and so forth?

[fol. 86] A. Yes, sir.

Q. And to your knowledge was a globe inserted in the locker room so that the electric lights were showing in the room before you left there?

A. Yes, sir.

Q. The light was turned on?

A. The light was on.

Q. Do you know whether there was a switch to that light?

A. Well, there is a switch in there but I don't know just where it is at.

Q. You have never seen it?

A. No, sir.

Q. At any rate, before they took you out of there, the lights were turned on?

A. That is right.

* * * * * * *

Q. By the way, before they took you out from the third deck on which you fell, did they bring a light down into the third deck, into the hold where you fell?

A. Yes sir.

Q. Were you able to see whether there were stanchions surrounding the hatch on this second deck?

A. There were stanchions there, yes.

Q. Was there any safety chain or any rope down there?

A. No, sir.

Q. Just an open hatch then?

A. Yes, sir.

* * * * * * *

[fol. 87] Mr. Hicks: You may take the witness.

Cross-examination.

By Mr. Wood:

Q. You can surely go fishing, can't you, Mr. Hust?

A. Well, I think that would be a lot easier than the rest of it.

Q. Especially if you were in a boat. Well, I wanted to take up this question of your wages, because that is where you left off just before the recess. Now, you said you earned on the ship from $330 to $340 a month?

A. $1705 for the five months' period.

Q. Well, that is what it comes to?

A. Yes, sir.

Q. And with the Kaiser people you are earning about $240 a month?

A. Something like that.

Q. What?

A. Yes, sir.

Q. But it is a fact, is it not, that employment on shipboard is not steady employment, but that there are intervals between ships? That is true, isn't it?

A. There is only supposed to be a short interval.

Q. Well, that depends upon how busy the shipping world is?

A. That is right.

Q. There is always some interval between one ship before you get a job on another ship, isn't there?

A. A lot of times fellows stay right on the same ship.

Q. Yes, if they are going to make another voyage right away.

A. That is right.

Q. But you don't deny that employment on ships is from ship to ship, do you?

A. That is right.

Q. And it is not the same kind of steady, continuous employment that you have at the Kaiser yard, is it?

[fol. 88] A. It would be steady now, yes.

Q. Well, it isn't usually, is it?

A. Well, I don't know. I never shipped out in peace time. I wouldn't know that.

Q. Then there is another thing, in the Kaiser yard you are getting $240 a month for safe and easy work; you yourself described it was very easy?

A. Yes.

Q. Perfectly safe?

A. Yes.

Q. And on the ship you were getting $300 a month for dangerous, hard work; that is right, isn't it?

A. Well, firing is not hard work.

Q. Well, you said the Government had been paying you a lot of money as bonuses for going into these dangerous areas, didn't you?

A. Well, now, I didn't say that. The Moore-McCormack paid those bonuses at the end of the trip, with the rest of my pay.

Mr. Hicks: A little louder, please.

A. I said Moore-McCormack paid those payments at the end of the trip, with the rest of my pay.

Q. Because you had been in dangerous areas?

A. Yes.

Q. Well then, it is certainly dangerous work, isn't it?

A. Well I suppose so.

Q. Now I would like to go back to the circumstances of how you got this job. You first had been on the Jonathan Edwards. That was another ship, wasn't it?

A. Yes, sir.

Q. And you left the Jonathan Edwards at the end of a voyage?

A. Yes.

Q. Where?

A. In New York.

[fol. 89] Q. Then did you come back here?

A. I came back here.

Q. How long an interval was it then between your leaving the Jonathan Edwards and your going on the Mark Hanna?

A. I believe it was just about a month. I would say, it might vary a day or two one way or the other, but it was not much over that. I got back here the 9th day of September and went aboard the Mark Hanna on the 3rd day of October.

Q. You got back here——

A. I arrived here on the 9th day of September and went aboard the Mark Hanna on the 3rd day of October.

Q. And you had left the Jonathan Edwards in New York?

A. Yes, sir.

Q. So you crossed the continent?

A. Yes, sir.

Q. So there was about a month- time between ships?

A. Yes, sir.

Q. You joined the Mark Hanna in Vancouver, did you?

A. I went aboard in Portland.

Q. I know, but you signed articles at Vancouver?

A. Yes, sir.

Q. You know when you sign articles that is when the job for that voyage begins, doesn't it?

A. Yes, sir.

Q. Of course, I know you must have signed them before a Shipping Commissioner; in fact, I think you said you did.

A. Yes, sir.

Q. Do you remember who it was?

A. I don't remember whether it was Mr. Jones or not. I am not sure.

Q. You refer to Lieutenant Harold Jones, of the Coast Guard?

A. Yes, sir.

[fol. 90] Q. He is in charge of the Shipping Commissioner's office here in Portland, isn't he; he is head man, isn't he?

A. He is the head Shipping Commissioner.

Q. His First Assistant, I think, is named Blundell.

A. I know him when I see him, that is about all.

Q. Anyway, one of them brought the Articles over to the ship at Vancouver and there you all signed on?

A. Yes, sir.

Q. And that was your contract of employment for that voyage, wasn't it?

A. Yes, sir.

. . . . . .

Q. What was the date of signing on?

A. October 9th, I believe.

Q. All right. On October 9th you signed Shipping Articles in the usual Government form on the Mark Hanna, didn't you?

A. We signed before the Shipping Commissioner, and the Captain was there.

Q. Yes, they are on the usual Government form of Shipping Articles. You know what they are?

A. Usually when you sign the Articles there are very few of the fellows that take time to read them. If they did, it would take a week to get them signed on.

Q. I am not asking you that. I am asking if you signed Shipping Articles in usual Government legal form?

A. Yes, sir.

Q. Have you ever seen those articles since?

A. No, sir.

Q. You must have signed off those Articles, didn't you, when you left the ship?

A. They only brought the payoff voucher for us to sign—for me to sign, anyway. They brought it out to the New York Marine Hospital at Staten Island.

[fol. 91] Q. That is because you were injured, I suppose.

A. Yes, sir.

Q. Now, in the early part of your testimony, you made the statement that you were paid your wages by Moore-McCormack?

A. Yes, sir.

Q. That, I think, is a conclusion and I am going to ask you if these are not the facts: Your wages were always paid in cash, weren't they?

A. Yes, sir.

Q. In fact, I think the law requires sailors' wages to be paid in actual money, does it not—at least, that is the practice, isn't it?

A. That is the practice anyway.

Q. So the way you were paid was that the Purser on the ship handed you an envelope similar to those that you showed, with your money in them?

A. That is right. That is the envelope he handed me.

Q. And it was the Purser of the ship that handed it to you?

A. Yes, sir.

Q. And you know no more about whether it was Moore-McCormack paying you than those facts indicate, do you?

A. Well, he was a Moore-McCormack man, and it was Moore-McCormack envelopes,—stamped on it.

Q. I understand that Moore-McCormack's name was on the envelopes, as shown there, but why do you say it was a Moore-McCormack man?

A. Well, he was the Purser on the ship.

Q. Certainly he was the Purser on the ship. But everybody on the ship had signed those Articles, hadn't they?

A. Yes, sir.

Q. Including the Purser, everybody on the ship, except the Captain, signs the Articles, don't they?

A. Yes.

[fol. 92] Q. So you don't know whether the Purser was a Moore-McCormack employee or an employee of the Government, employed by the Captain, do you?

A. I believe the Pursers are hired by the steamship companies themselves.

Q. I am asking you what you know, Mr. Hust, not what you believe.

A. I don't know.

Q. How did you happen to join the Mark Hanna rather than some other ship; did you say you went up to the Shipping Commissioner's office and applied for a job?

A. Not at that time. I went to the Union hall.

Q. You were hired out of the Union hall?

A. Yes, sir.

Q. And the Union hall sent you to the ship?

A. The Union hall sent us to the ship.

Q. And there is where the Shipping Commissioner met you and you signed on—on the ship?

A. Yes, sir.

Q. Now, when you entered this forepeak locker where the line was, you say you had never been in that place before?

A. No sir, I hadn't.

Q. But you had been in a place almost exactly like it on the Jonathan Edwards, hadn't you?

A. I am not too sure whether I was ever in that locker on the Jonathan Edwards or not. I am not positive about that. I don't believe I was ever in that locker.

Q. I don't set too much score by it, but you remember testifying when you gave your deposition about these matters in October, 1943?

A. Yes, sir.

Q. No, it was November—excuse me—in 1943. I think you testified at that time you had been in the locker just like this on the Jonathan Edwards. Don't you remember that?

[fol. 93] A. I might have been in it on the Jonathan Edwards.

Q. I will read to you from this deposition; I think it will refresh your memory. I will ask you if you didn't testify like this—I asked the question: "If you hadn't been down there before, how did you know there was a hole down there? Answer: I was down there on another ship, a Liberty ship. Question: The same general type of ship? Answer: The same general type, a Liberty ship. Question: That is, you were on before. What was the name of it? Answer: Jonathan Edwards." Do you remember that? Don't you remember testifying to that?

A. Yes, sir, I do.

Q. Now, there was a lot of talk here before the jury about a hatch, and I am not sure they all understand what these shipping words mean. What is a hatch?

A. Well, generally speaking you talk of the main cargo hold as your hatches. The small ones—they also call those hatches, the seamen do.

Q. Well, a hatch is an opening on the deck, isn't it?

A. That is right, yes, sir.

Q. It might be as big as this table, or it might be nearly as big as this room?

A. Yes, sir.

Q. According to the different occasions.

A. Yes, sir.

Q. Now, when you went into this room from the forepeak, you went down a hatch?

A. Yes, sir.

Q. How big is that hatch, about as big as this table?

A. No, sir.

Q. How big?

A. About four feet in diameter.

Q. The cover was off of that hatch?

A. The cover was open. It has a watertight cover. They seal that down while they are at sea.

Q. And there was some daylight coming down?

[fol. 94] A. Some, yes, sir.

Q. So that you could dimly see the man in front of you?

A. I could just see the outline of him.

Q. Why didn't you, instead of stumbling around there in the dark, try to turn on the electric light?

A. I didn't even know where the switch was.

Q. Did you make any effort to find out?

A. No, sir.

Q. And neither did Cameron?

A. No, sir.

Q. But later on when you were hurt, they did light a light there, didn't they?

A. Yes, sir, they did.

Q. I understand from your—either your testimony or one of the other witnesses whose deposition was taken, that bulb was burned out but after you got hurt they put a new bulb in there and it burned all right.

A. Yes, sir.

Q. And they took you out by that light, didn't they?

A. Yes, sir.

* * * * * * *

[fol. 95] Mr. Green: This is the deposition of Karl M. Nelson, taken on Tuesday, November 30, 1943, commencing at two o'clock, p. m., in the office of Wood, Matthiessen & Wood, 1310 Yeon Building, Portland, Oregon.

(Counsel then read the deposition to the jury, as follows):

"Direct examination.

By Mr. Hicks:

Q. Will you state your full name, please?

A. Karl M. Nelson.

Q. Mr. Nelson, were you a member of the crew of the S. S. Mark Hanna on the 9th day of March, 1943?

A. Yes.

Q. And you had been a member of the crew for some time prior to that?

A. Yes.

Q. What was your capacity?

A. Able seaman.

* * * * * * *

Q. Do you remember the incident whereby one Cecil I. Hust received certain injuries aboard the vessel on the 9th day of March, 1943?

A. Yes.

Q. Where on the boat were you stationed immediately prior to the time he received his injuries?

A. Right in the bow, forward.

Q. And where would that be with reference to the locker room into which he fell?

A. It was right above.

Q. What was the first knowledge that you had that something had occurred?

A. I heard one seaman make a statement that somebody had fallen down into the forepeak.

Q. What did you do then?

[fol. 96] A. Immediately after I heard it, as soon as I finished the job I was at, a couple of minutes, I went down to see who had been hurt.

Q. You went down into the locker room?

A. Yes.

Q. What did you see when you got down there?

A. When I first got down I saw a group of seamen standing around with a torch in their hands, and they had it shining below, and there were two seamen below there, and Hust was laying on his back across this manhole cover.

Q. You say someone had a torch there?

A. Yes.

Q. What kind of a torch?

A. An emergency lantern they have in case the lights fail.

Q. They use in case the lights fail?

A. Yes.

Q. Is it an electrical contrivance, something of that kind?

A. No, it has a battery.

Q. A battery electric?

A. Yes.

Q. What kind of light did it cast?

A. It cast a spot, a small spot.

Q. How many were present in the locker room when you got down there, if you can recall?

A. Six, I believe.

Q. How long did you remain in that locker room?

A. Oh, not more than two minutes at the most—less than that.

Q. Did you have occasion to observe whether there was an electric light burning in the locker room when you first went down?

A. I noticed that. It had not been burning.

Q. Now, was it burning at the time you came down into the locker room?

A. No, it was not.

[fol. 97] Q. Did you see anyone replace the light or fix it?

A. No, I didn't see them replace it, but it was burning immediately after that.

Q. You mean by that,—was it burning before you left the locker room?

A. Well, when I started out it had been burning then.

Q. When you started to leave the locker room?

A. Yes, when I started up the ladders. If I am not mistaken, I might even have turned on the switch,—you turn a switch on for it; but I don't recall that.

Q. Now do I understand that you turned the switch on?

A. No; I might have, if I had been climbing up, but I don't remember.

Q. But you didn't see anyone repair the light while you were there?

A. No.

Q. What, if anything, did you observe in the locker room where Mr. Hust fell, in regard to the stanchions protecting the deck?

A. There was no guard chain around the stanchions because it is an open hatch; there is supposed to be a guard chain around there to protect, you know, from——

Mr. Wood: (interrupting) Excuse me. Just to keep it clear, it is not so much a hatch as it is a manhole, is it?

A. Well, it isn't a manhole. It would be an open hatch. It is about six by six, I believe.

Q. Now, the open hatch that you refer to, that would be constructed on the first deck below the main deck, would it?

A. The first deck below the main deck, yes.

Q. How is it constructed? Will you give the approximate dimensions?

A. You mean the opening?

Q. Yes, and the stanchions.

A. Well, the opening was about six by six, and in each corner there was a stanchion about 36 inches or more high, about 40 inches high; that is, in the four corners.

[fol. 98] Q. Of the——

A. (interrupting) Of the opening.

Q. Had you been in this particular locker room before?

A. Yes.

Q. And you had seen these stanchions on this hatch before?

A. Yes.

Q. And on the other occasions when you had observed it, what did you observe, if anything, with reference to a safety chain?

A. Well, a chain was on there before.

Q. How many times previously had you been in this locker room, roughly, if you can state?

A. You mean since the torpedoing?

Q. Any time.

A. Oh, a number of times. There had not been a day go by that I hadn't been down there once.

Q. Had there been any days, occasions that you observed, when the safety chain was not present on the stanchions?

A. No.

Q. Was there a safety chain or any kind of rope or other device on the stanchions on the occasion when you were down after Mr. Hust's accident?

A. No, there was not.

Q. Did you observe whether or not a chain or other device was installed on the stanchions?

A. I did notice that later, they had put a rope guard around there.

Q. You didn't see that work done?

A. No, I did not.

* * * * * * *

Mr. Hicks: I think you may inquire.

[fol. 99] Cross-examination.

By Mr. Wood:

Q. What was the Captain's name?

A. Henry Hoeppner.

Q. Where had you signed shipping orders for this voyage?

A. Vancouver, Washington.

Q. When?

A. The 10th of October, I believe.

Q. Had you all signed at the same time?

A. Yes, we all signed at the same time.

Q. Including Mr Hust?

A. Yes.

Q. The ship was a Liberty ship turned over to Moore-McCormack at Vancouver, was it?

A. Yes, it was a Liberty ship.

Q. That is where the voyage began?

A. Well, it began in Portland. We didn't sign on until we got to Vancouver.

Q. The actual voyage begins when you sign on; you know that?

A. Yes, sir.

Q. Then you had been on this ship for quite a number of months before the torpedoing?

A. Yes.

Q. Did you say you were on the forecastle head when the accident happened?

A. Yes.

Q. And you heard somebody say that a man had fallen down; that caused you to leave the forecastle head?

A. Yes.

Q. How did you descend from the forecastle head?

[fol. 100] A. There is a ladder that goes below.

Q. To the main deck?

A. Yes.

Q. To the well deck?

A. Well, it has no well deck.

Q. Oh, it hasn't? It isn't a well-decked ship?

A. No.

Q. So when you speak of the forecastle head you mean you were just forward on the main deck?

A. On the main deck.

Q. Up in the eyes of the ship?

A. Yes.

Q. Then how did you descend from there into the locker room?

A. By a ladder.

Q. There was a locker room directly beneath where you were standing?

A. Yes.

Q. Or a manhole?

A. A manhole, you might call it.

Q. Is that the same one Hust and the other men had gone down?

A. Yes, sir.

Q. Ahead of you?

A. Yes.

Q. So that manhole I suppose had been left open by them, then you followed them?

A. It has always been; it has a door that is propped up whenever you are working down there.

Q. How big is that manhole?

A. Four by four, I think.

Q. Square or round?

A. Square.

Q. And how far down was it to the main deck in the locker room?

[fol. 101] A. About nine feet.

Q. Is that manhole directly vertical over the hatch through which Mr. Hust fell?

A. No.

Q. What relation do the two bear one to the other in distance apart,—or position, is what I mean?

A. They are about ten feet apart, I imagine.

Q. Vertically?

A. No.

Q. Horizontally?

A. Horizontally.

Q. Which one is forward of the other?

A. The after one, the one you go in first, was forward of the one Hust fell down.

Q. I see. I have forgotten, what time of day or night was this?

A. Oh, it was in the morning, somewhere around seven-thirty or eight-thirty, something like that.

Q. Was it light yet?

A. No, it was still—it was getting daylight but it wasn't light.

Q. About seven-thirty in the morning your complaint says. Did you have a light to assist you in going down?

A. No.

Q. How did you see to get down?

A. Well, you don't have to see there. You just follow the ladder right down.

Q. Well, when you stepped out on the main deck below in the locker room, could you see?

A. I could see the torch and I just followed the outline of that.

Q. You could see the light of a torch?

A. Yes.

Q. Who had that?

[fol. 102] A. I believe the Boatswain had that.

Q. Had he been there when Hust fell or did he come afterwards?

A. No, he came afterwards.

Q. You don't know where he had been working before that?

A. Yes, he had been working on the top deck up forward.

Q. Up where you were?

A. Yes.

Q. By the way, what kind of work were you doing up there?

A. We were transferring our towline hauser from one towboat to a converted yacht.

Q. Then I suppose that when you heard cries, or a statement or something that told you a man had fallen down, the Boatswain would be the first one to go down from your position?

A. Yes.

Q. And when you got there you saw Mr. Hust lying on a hatch cover, did you?

A. Yes, a manhole cover.

Q. But he had been hoisted up out of the——

A. (interrupting) No, he was still lying where he had fallen.

Q. But did you see him down below?

A. Yes.

Q. You looked down through the open hatch?

A. Yes, sir.

Q. And you saw him lying below?

A. Yes.

Q. How far below?

A. About seven or eight feet, approximately.

* * * * * * *

Q. And I suppose you mean you could see Mr. Hust by the light of the flashlights?

A. Yes.

Q. When you speak of torches, do you mean these ordinary flashlights?

A. That is what I usually call a flashlight, a torch. This [fol. 103] is a light, more or less a storm lantern.

Q. Operated by a battery?

A. Yes.

Q. It would be much like a flashlight?

A. Yes.

Q. Do you know why the chain wasn't in place around these stanchions?

A. No, I don't.

Q. You don't know how it came to be removed?

A. No.

Q. Or for what purpose?

A. No.

Q. Do you know how long ago it had been removed?

A. I know it was there the day before.

Q. In place?

A. Yes.

Q. You saw it?

A. Yes, sir.

Q. Somebody had removed it?

A. Yes, sir.

Q. Now, the bulb light that illuminated the locker room was out when you went down?

A. Yes.

Q. But before you went up again it went on?

A. Yes, before I went up again. Somebody had replaced it, or turned on the switch, I don't know.

Q. You don't know how it went on?

A. No.

Q. You think you were only down there about two minutes?

A. Approximately two minutes. I had work to do on deck. I just went down to see what had happened.

Q. How heavy a chain was this one that was missing from the stanchions?

[fol. 104] A. Oh, about three-quarters of an inch, something like that.

Q. How old are you?

A. Twenty-one.

* * * * * * *

Mr. Wood: That is all.

Re-direct examination.

By Mr. Hicks:

Q. One other question. To what extent, Mr. Nelson, was light admitted through from the main deck down into the locker room?

A. Well, there is very little light. It just casts a small glow of light, what light there was. There was not very much light.

Q. Well, could you describe that a little more fully for us, as to the extent you could see in that locker room in the absence of a light at all, if you know?

A. You couldn't see in there without a light.

Q. Had you been in that locker room when a light was not burning?

A. Have I?

Q. Yes.

A. Yes.

Q. As I understand it, from the point where the ladder from the manhole hit the floor it would be about ten feet across in the room to where the hatch would be located?

A. Yes.

Q. The hatch down which Mr. Hust fell.

A. Yes, and also immediately below the first opening there is a stanchion that comes up in a V-shape and cuts off any view of the hatch where Hust had fallen.

Q. You mean by that, it prevents the light from going down through the manhole into the locker room?

A. Yes.

Mr. Hicks: I think that is all.

[fol. 105] Re-cross examination.

By Mr. Wood:

Q. Where did you say that V-shaped stanchion was?

A. It is just aft of the—when you *do* down the ladder from the top deck down into the main deck, the locker room, when you start walking aft, right directly in front of you is this V-shaped stanchion. It comes up from the deck to the overhead.

Q. Well, a stanchion is not a plate, it is a small vertical shaft?

A. Yes, but a stanchion can be round, and it can be square.

Q. Yes, but I don't see how it would cut off any light. It is a mere shaft, rather small?

A. No, it is fairly wide, like that (indicating) at the widest spot; it is all solid.

Mr. Hicks: Indicating with his hands an area about three and a half feet apart.

Mr. Wood: That is all.

(Witness excused.)"

(Counsel then read the deposition of Alfred H. Torgerson, as follows):

"ALFRED H. TORGERSON, a witness in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hicks:

Q. Where do you reside, Mr. Torgerson?

A. 3115 Southeast 9th Avenue.

Q. You are a Portland boy, are you?

A. Yes.

Q. And your age, please?

[fol. 106] A. Twenty-one.

Q. On the 9th day of March, 1943, you were a member of the crew of the S. S. Mark Hanna?

A. Yes.

Q. And in what capacity?

A. Able seaman.

Q. Do you remember an incident that occurred on March 9th, 1943, in which Cecil I. Hust was injured?

A. Yes, I do.

Q. About what time of day did that occur, if you can recall?

A. I can't really say that. I know it was during the daytime.

Q. Well, was it in the early morning, or late morning, or the afternoon?

A. That I couldn't say. I believe it was in the morning, though.

Q. What was it first attracted your attention to the incident?

A. I heard a commotion down below in the forepeak and I ran down there to see what it was. I knew that two men had gone down. When I started to go down I heard somebody say that somebody had fallen.

Q. Is there a manhole leading from the main deck down into the locker room?

A. Yes.

Q. And where were you stationed with reference to the manhole when you heard this commotion that you speak of?

A. On the starboard side, I imagine about—I would say about five feet from it.

Q. And what did you do?

A. I went down there right away.

Q. You descended into the locker room, did you?

A. Yes.

Q. And what did you observe in the locker room, were there any lights on there?

A. No, when I first went down there, there was darkness.

Q. There was darkness in the locker room?

[fol. 107] A. Yes.

Q. Then were there some people on the deck below?

A. There was one fellow there, I believe, one or two. I don't believe I was the first one that got down there, I think someone got down there before I did.

Q. When you say "down there" do you mean the deck below the locker room deck, the floor?

A. No, I mean when I first went down, I naturally went down to the deck above there, the main deck. Then I went down to the next deck.

Q. That is where the people were?

A. Yes.

Q. Do you recall the names of any person or persons who were down there when you got down there?

A. Yes, there was Don Cameron for one I know of besides Ted Hust.

Mr. Wood: Excuse me, I want to understand it. Ted Hust had fallen from the locker room to the deck below, hadn't he?

A. Yes.

Mr. Wood: So did you go down to the level where Ted Hust was lying?

A. Yes.

Mr. Wood: Or did you stay up in the locker room?

A. I went down where he was lying.

By Mr. Hicks:

Q. And it was on that level you observed these people you were telling us about?

A. Yes.

Q. When you got down to that level, which would be the second level below the main deck, tell us what you observed.

A. Well, first before I went down where Ted Hust was, one of the fellows that came down with me brought a torch, an emergency light. We shined that down on Ted Hust. That is the only way I could possibly see him. I couldn't see him otherwise.

[fol. 108] Q. That was after you had gotten down to the second level?

A. Yes.

Q. Now just tell us in your own words what you saw when you got down there with your torch so you could see.

Mr. Wood: Well, he didn't have a torch, himself.

A. Well, the other fellows did. I saw Ted lying on his back, and naturally he was in pain, by the expression of his face, and it seemed to me, if I remember correctly, he had one arm behind his back; so we went down there right away to see what we could do, and helped him out of there.

. . . . . .

Q. Now when you went into the locker room from the main deck and down through the manhole, was there any light in that locker room?

A. No.

Q. Was there any light coming through the manhole into the locker room?

A. No. I don't believe the sun was shining that day; it was overcast.

Q. Well, did you get down there before anyone had brought the torch that you mentioned, or the lantern?

A. Well, the fellow that brought the torch down came down at the same time I did, right after.

Q. Now, to what extent, if at all, were you able to see in the locker room without the aid of the lantern or the light?

A. You couldn't see at all. You see, when I first got down there I couldn't see anything, just coming out from light into the darkness, and as soon as the torch was used we never turned it out, we just kept it lit. There wasn't any time I tried to see without the torch; but I couldn't see when I first got down there. I stood still until the torch was lit and made my way down.

Q. Were there any electric lights burning in the locker room?

A. No, none at all.

Q. Did you go from the first deck below the main level down to the room below, where Mr. Hust had fallen?

[fol. 109] A. Yes.

Q. The two of you?

A. Yes.

Q. How long did you remain down on the second level there where Mr. Hust was?

A. Just long enough to put that—well, down where Hust was, himself?

Q. Yes.

A. Only long enough to help him out of there.

Q. And then did you after that remain in the locker room for some period of time?

A. No. I helped him get up on the main deck and then this other fellow and I went down with the torch—we went back down in there and put this rope around the hatch, around the stanchions.

Q. I understand that you and another fellow placed a rope on the stanchions; that would be on the main deck below the main deck?

A. Yes.

Q. What was the name of the other fellow?

A. I am pretty positive it was the Boatswain, Bob Heay.

Q. And did the two of you install a rope around the stanchions there to take the place of a safety chain?

A. Yes.

Q. What kind of a rope was it?

A. Oh, I would say it was about a one-inch line,—just large enough to go through the holes of the stanchions.

Q. Where did you procure the rope, or where was it procured?

A. Right on the same level as the stanchions.

Q. There was a rope there on the same level, in the same locker room?

A. Yes.

Q. Was the rope then picked up from that room and installed around the stanchions, or on the stanchions?

A. Yes.

Q. At whose instance or order, if anyone's, did you so install the rope?

[fol. 110] A. It must have been the Captain that told us to do it. Otherwise, we wouldn't have done it right away.

Q. Well, do you remember who it was that gave you the order to install the rope.

A. I would say it was the Captain. And then the Boatswain tells us what to do after that.

Q. How long did it take you to install it?

A. Well, we did it right away as soon as we got Ted out of there, so it wouldn't happen again to somebody else.

Q. What I mean is, did it take you five minutes, or three minutes? How long did it actually take you to install that rope on the stanchions?

A. I would say it would take from five to ten minutes.

Q. And how long was it after Mr. Hust fell that the rope was installed on the stanchions?

A. Oh, it must have been at least twenty minutes.

Q. When, if at all, was the electric light from the facilities of the ship, the regular light, placed in order?

A. Well, it must have been while I was putting the rope on the stanchions; the light must have been working, because I don't remember using a torch.

Q. Let us put it this way: did you see anyone repair the light or install the globe while you were down there?

A. No, I didn't see it.

Q. Can you state whether or not the electric light of the ship was burning at the time you left the locker room?

A. Yes, I would say that.

Q. It was burning?

A. Yes.

Q. Now, that electric light that I mention there, is that part of the lighting system of the ship?

A. Yes.

Q. Is it equipped with a globe screwed into a socket just [fol. 111] as an ordinary electric light?

A. Yes, it is.

Q. And you say that was burning at the time you left the locker room?

A. Yes.

Q. And that would be within a period of how long after Mr. Hust fell?

A. Well, I would say it took ten minutes—about twenty minutes altogether, so I know twenty minutes after he had fallen it was burning. I am sure of that.

Q. Had you been in this locker room before?

A. Oh, yes, quite a few times.

Q. On the other occasions when you were in the locker room did you observe anything with reference to the safety chain?

A. It was there before.

Q. You had been in there many times before, as I understand?

A. Yes, quite a few times.

Q. And it had always been there before?

A. Yes.

Q. Do you know why it had been removed?

A. Some work on deck. They had been using it on deck.

Q. Do you know when it was that the chain was removed from the stanchions?

A. Let me think; it seems to me it had been taken out quite a while before.

Q. Now if you know, just state it. If you don't know, say so.

A. No, I am not certain as to the time. Well, just—no, I can't say just how long it was.

Mr. Hicks: I think you may inquire, Mr. Wood.

Cross-examination.

By Mr. Wood:

Q. I understood you at first to say that you didn't know whether that light was burning in the locker room when you left or not, except you think it was because you were

doing some work down there and you didn't have any torch. [fol. 112] Is that the only reason you think it was burning?

(No answer.)

Q. What makes you say you are sure that light was burning before you left the locker room?

A. Well, if I didn't use the torch I couldn't have seen to put the rope on there.

Q. Well, maybe somebody else had a torch there.

A. No, there was no torch being used.

Q. But that is the reason you think the light must have been burning?

A. Yes; there was no other way I could have seen it.

Q. But you don't know who fixed the light?

A. No, I don't know that.

Q. And you don't know how it was fixed?

A. No.

Q. You don't know whether a bulb was replaced in or whether just the switch was thrown, do you?

A. No, it wasn't the switch was thrown. The bulb was replaced, I know that.

Q. How do you know that?

A. Because while I was down there, I don't know who it was that said it, but somebody said, 'Replace the bulb in that light', and I looked at the light when we had the torch down there and it wasn't burning. I looked up at the light.

Q. You could see the bulb?

A. Yes, when they shined the torch, I looked.

Q. It was black?

A. Yes.

Q. Later on it was lit?

A. Yes.

Q. But you didn't see anyone replace it?

A. No. I was helping Hust while that was going on. Some fellows came down afterwards.

[fol. 113] Q. By the way, were you an A. B. at that time?

A. Yes.

Q. You had been to sea before?

A. Yes, I had.

Q. How many voyages before this?

A. One trip before that.

Q. What ship?

A. George Clymer.

Q. The same ship that Mr. Nelson was on?

A. Yes. That was a Liberty, too.

Q. But Hust had not been on that ship, had he?

A. On the first one, the Clymer?

Q. Yes.

A. No, he hadn't.

Q. Now, you said you didn't know how long before the accident that chain had been removed, but you did say it had been taken up on deck for some sort of work up there?

A. Yes.

Q. How do you know that?

A. How do I know it had been taken up for some sort of work?

Q. Yes.

A. Well, the chain was up on deck after the accident, I know that.

Q. Do you know what it was doing there?

A. Well, it seems to me that we used it as a stopper on this towline when we took it up on board. When we lost the towline from the tug it seems we used the chain as a stopper on this heavy manila line, put a messenger, I think, to the line, used the chain as a stopper and pulled it up on deck. The chain was being used there some place on that line.

Q. On that second line?

A. On the heavy line, yes, the line we were being towed by.

Q. Well, your first line had parted, hadn't it?

[fol. 114] A. Yes.

Q. Then you had re-established connection with another tug or something with the second line; and the chain you mean was on the second line?

A. Well, the line was lost from the first tug, parted. We had taken it up on deck and passed it over to him.

Q. And that is the line the chain was on?

A. Yes.

Q. But you don't know who had done that?

A. Who had gotten the chain?

Q. Who had put the chain on that line; you don't know that?

A. No, I don't know that.

Q. Or who had ordered it; you don't know anything about that?

A. No.

Mr. Wood: That is all.

Redirect examination.

By Mr. Hicks:

Q. Mr. Torgerson, do you know that this chain we have been speaking of that was used on deck was the same chain that had formerly been used as a safety chain on the stanchions?

A. Yes.

Q. You know that to be the same chain?

A. Yes, because there was only one chain like that on the ship.

Q. And you assisted in that operation yourself, did you; that is, the use of the chain in connection with the towline, and so forth?

A. Yes, sir.

Q. Had you been in the locker room of this other Liberty ship that you had served on?

A. Yes.

Q. And did it have stanchions and a safety chain?

A. Yes.

Q. Had you been in that locker room on various occasions?

[fol. 115] A. Yes, I had.

Q. What is the fact as to whether or not the safety chain had always been maintained?

A. It was always there. It was never taken off.

Q. Who paid you your checks for your service on the ship?

A. Moore-McCormack.

* * * * * * *

Recross-examination.

By Mr. Wood:

Q. You say you were paid by check?

A. Yes.

Q. Seamen are usually paid their wages by cash?

A. When you are paid off you are paid by cash. Sometimes you get a check, instead of sending home your allotments.

Q. Did you make allotments?

A. Yes.

Q. To whom?

A. My mother; and the money always came to her by check from Moore-McCormack, and when we came to the final payoff, we got cash.

Q. When you were paid off the voyage, you drew it in money, didn't you?

A. Yes.

Q. And you didn't draw any checks at all?

A. No.

Q. The only checks that were ever paid were allotment checks to your mother, is that right?

A. Yes.

Q. Did you ever see those checks?

A. Yes; I seen the stubs of them and the envelope they came in.

Q. Where are those checks?

A. Well, the checks have been spent, but the stubs are still there and the envelopes are still there.

Q. Still where?

[fol. 116] A. At home.

Q. Did you sign Articles on the ship along with the rest of the crew at Vancouver, the way Mr. Nelson testified?

A. Yes, I did.

Q. Before a Shipping Commissioner, I suppose?

A. Yes, it was before a Shipping Commissioner.

Mr. Wood: That is all.

Redirect examination.

By Mr. Hicks:

Q. Mr. Torgerson, you were not present when Mr. Nelson gave his deposition, were you?

A. No, I was not.

Mr. Hicks: That is all.

(Witness excused.)"

* * * * * * *

[fol. 117] Portland, Oregon, Monday, May 15, 1944, Ten O'clock, A. M.

DONALD CAMERON, called as a witness in behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hicks:

Q. Your name is Donald Cameron?
A. Yes, sir.
Q. Where do you reside, Mr. Cameron?
A. In Portland.
Q. You are a Portland boy?
A. Yes.
Q. What is your age, please?
A. Twenty-six.
Q. Did you have occasion to ship aboard the S. S. Mark Hanna in October of 1942?
A. Yes.
Q. And were you a member of the crew of which Mr. Cecil Hust, the plaintiff in this case, was a member of the same crew aboard that vessel?
A. Yes.
Q. Where did you ship from, Mr. Cameron?
A. From Portland.
Q. And Mr. Hust, to your knowledge, shipped at the same time and under the same circumstances?
A. I think he did. I am not sure whether he shipped from Portland or not; I can't remember him as a member just then.
Q. What was your capacity aboard the vessel?
A. Ordinary seaman.
Q. And as an ordinary seaman, what were your duties?
A. Well, to work on deck and to stand lookouts steer, and general upkeep of anything on the deck.
[fol. 118] Q. Your duties then related specifically to the deck, is that correct?
A. Yes.
Q. And the maintenance of the deck facilities and that sort of thing?
A. Yes.

* * * * * * *

Q. Can you describe briefly what part of the vessel was affected by the torpedo?

A. Well, the torpedo struck in the No. 5 hatch, and the after end of the vessed was disabled. The engines were completely stopped, and it sort of went down at the stern and the bow went in the air.

* * * * * * *

Q. After that were the electric lighting facilities of the ship available; were the electric lights operating on the ship after that?

A. Yes, they were.

* * * * * * *

Q. During the eight-day period from the time of the torpedoing until your arrival at the Port of Spain, Trinidad, did the members of the crew perform their normal functions and operations as crew members aboard the ship?

A. The ones that were aboard did. Half of the crew abandoned ship during the night, and the remaining half—well, we sort of had to take over the duties that the other half left.

Q. Do you remember the incident in respect to which Mr. Hust, the plaintiff in this case, received certain injuries?

A. Yes, I do.

Q. Did you and Mr. Hust receive certain orders in respect to the moorage line?

A. Yes.

Q. Will you tell us what the orders were and who gave them, if you know?

A. Well, there was a tug standing by—I think there were two tugs, and they were switching lines, we were switching from one tug to the other, and they needed another mooring [fol. 119] line to send over to one of the tugs, so either the Captain or the Boatswain gave the order to go below—that is, up in the forepeak, to get the end of the mooring line and send up to them. I didn't know it was Mr. Hust at the time who was following me.

Q. Now, can you describe the mooring line to us? What kind of a line is it, how heavy is it, and so forth?

A. Well, it is an 8-inch manila line; it is just about that big around (indicating).

Q. You mean eight inches in diameter?

A. No, it would be eight inches completely around. The circumference is eight inches.

Q. Very heavy?

A. Yes, it is quite heavy.

Q. How long a line would it be, if you know?

A. It would be sixty fathoms. That is about 360 feet long.

Q. Would it be such that one man could handle it alone?

A. No.

Q. Could two men?

A. Two men could handle the end.

Q. And that was the towline that you and Mr. Hust were ordered to obtain from the locker room, is that correct?

A. Yes.

Q. And where was it you were ordered to procure the towline from?

A. In the forepeak.

Q. The forepeak; and you refer by that to the locker room?

A. Yes, it is a locker room.

Q. Are you familiar with that locker room?

A. Yes, I am.

Q. And had you been long familiar with it prior to the time you went down on the 17th of March to get the towline?

[fol. 120] A. Yes.

Q. In your duties as ordinary seaman did you have occasion from time to time to go into the locker room?

A. Yes.

Q. With what frequency would you go in there?

A. I would go in there at least every day or every two days, sometimes twice a day.

Q. What about the other members of the deck crew, would they have occasion to go in there from time to time with some frequency?

A. Yes, all of the deck department would be in there quite often.

Q. Will you describe the locker room to us? Give its dimensions, and the purpose for which it was used.

A. Well, this locker room was used to stow all the gear that we used on the deck, including mooring lines, paint, and everything we needed. It was,—oh, I should say about 25 feet long, and it came from the bow of the ship so it was sort of in—it was not a square shape.

Q. It was sort of the shape of the ship?

A. The shape of the bow of the ship, and it must have been about twenty feet wide, I would say. Then there was a lower forepeak, one down below that—another locker room where we also kept all of our stores, and that was slightly smaller.

Q. Would that be on the third deck, you are talking about now, the lower one?

A. Well, you could call it the third deck; there is a main deck and then what we call that boatswain's locker, and then the store-room below. It would be the third deck.

Q. Was the main locker room, the one we are concerned with here, partitioned off in any way?

A. Just aft of the locker room was a small carpenter shop. There was a partition between that and the carpenter shop.

[fol. 121] Q. And to get from the carpenter shop to the locker room, was it necessary to go across the locker room?

A. Yes, it was.

Q. And then there was a door leading into the carpenter shop?

A. Yes.

Q. Was there a hatchway or a hatch, an open hatch, in the locker room leading down to the third deck?

A. Yes, there was.

Q. Will you describe that for us?

A. Well, it is about eight feet square, I should say, eight or ten feet square, something like that—I don't know the exact measurement—six, eight or ten, somewhere around there, and it is guarded—it has no cover on it at all.

Q. It never does have?

A. It never does have a cover on it, no hatch cover at all; and there are four stanchions around, one on each corner, and there is ordinarily a chain led through these stanchions to prevent anyone from falling into the open hatch.

Q. These stanchions are upright steel bars, are they?

A. Yes, they are.

Q. Are they located on each of the four corners of the open hatch?

A. Yes, they are.

Q. About how high above the floor do the stanchions rise?

A. Oh, just about waist high, I would say, about three feet.

Q. And does the chain that goes about the top of the stanchions completely encircle the hatch?

A. Yes, it does.

Q. Now, in getting from the second deck or the locker room down to the third deck, how do you do that; do you climb over the safety chain and go down the ladder, or how do you do it?

A. No, it has a latch, just a snap that you unsnap, and [fol. 122] leave the chain alone, and then you go down the ladder. It is a vertical steel ladder.

Q. Then as you go down, you re-snap the chain, I take it, so that it always encircles the hatch?

A. You should, yes.

Q. What is the purpose, if you know, for the stanchions and the safety chain you have described around the top of the stanchions?

A. The purpose is just a safety device. It is for the purpose to keep anyone from falling in there or anything falling in there at all. It is just a safety device, is all it is.

Q. How far is it, if you know, from the locker room down to the third deck through the open hatchway that you have described?

A. Oh, I would say ten or twelve feet.

Q. Where is this open hatchway or hatch that you have described with reference to the vertical steel ladder leading down from the main deck?

A. Leading down from the main deck to the hatch?

Q. Yes.

A. It is about, I would say it is around ten feet aft of the first ladder.

Q. Then as I understand it, you would come down the steel ladder which runs vertically, straight up and down, and then you would have to walk across the floor of the locker room for a distance of about ten feet before you would come to the open hatch?

A. Yes.

Q. Is the locker room in its normal operation equipped with electric lights?

A. Yes, it is.

Q. And is there a switch for the lights?

A. Yes, there is.

Q. And those lights are similar to the lights we have in our homes, where you just turn a switch on and the light goes on?

A. Yes, they are; they are similar.

Q. Now tell us, Mr. Cameron, in your own way what you did when you proceeded to execute the order given [fol. 123] you by your superior officers to obtain the tow-line; state what you did.

A. Well, I proceeded to go down to the forepeak, down the ladder into the forepeak, and as I went down I tried the switch. I don't actually remember reaching over and trying the switch, but I know I did, because otherwise I wouldn't go down in the dark to work in a place where I could have light.

Q. Let us put it this way: were there lighting facilities available in the locker room at that time?

A. Do you mean, were they available?

Q. I mean, was there a light you could turn on?

A. Yes, as far as I know there was a light I could have turned on.

Q. Let us get that straight. Do you mean you could have turned the switch on at this time and gotten the light?

A. If I had turned on the switch and it was working, I could have gotten the light.

Q. Was the light working?

A. It wasn't working, no.

Q. But you can't actually remember distinctly whether you turned on the switch or not?

A. No, I don't actually remember putting my arm over, but the switch is located right near the ladder, so every time you go down, you turn on the switch. You don't go into a dark locker room like that.

Q. What would you say as to whether you did undertake to operate the switch? Give us your best recollection on that.

A. I remember I did.

Q. And there were no lights available?

A. No lights.

Q. As you proceeded into the locker room, what was the condition of visibility?

A. Poor. It was dark in there, and being familiar with the locker room, I knew where to go. I knew where the line was stored—I had helped store it—so I proceeded to go over to the line, to grab the end of the line. Do you [fol. 124] want me to tell the whole story?

Mr. Hicks: I want to interrupt the witness, if I can, your Honor. Dr. Tegart is in the courtroom and there are reasons of emergency why he should be put on and permitted to go as soon as possible, if counsel has no objection.

Mr. Wood: There is no objection.

The Court: Very well.

(Witness withdrawn.)

[fol. 125] Commander HAROLD C. JONES, called as a witness in behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hicks:

Q. Commander Jones, what is your official title with the Government?

A. U. S. Shipping Commissioner.

Q. And your office is down in the Failing Building in Portland?

A. Yes, sir.

Q. Commander, there has been some interest expressed here in the Shipping Articles with reference to the Mark Hanna, which sailed in March, 1942. Did you at my request and under subpoena bring the Articles with you?

A. I did.

Q. Those are the Articles which you have in your hand?

A. Yes.

Mr. Hicks: Which I ask to be marked for identification as Plaintiff's Exhibit 13.

(The Shipping Articles of the Mark Hanna were marked Plaintiff's Exhibit 13 for identification.)

Mr. Hicks: We offer Plaintiff's Exhibit 13 for Ident. in evidence. It may be stipulated that a copy may be substituted for the original, so that the records of the Government may be kept intact. Is that agreeable, Mr. Wood?

Mr. Wood: That is all right.

The Court: Very well. Are they offered in evidence?

Mr. Wood: I have no objection.

The Court: They will be received.

(The Shipping Articles, previously marked Plaintiff's Exhibit 13 for Ident., were received in evidence.)

Q. Now, the Articles contain the names of the crew members, do they not, Commander?

A. Yes.

[fol. 126] Q. And the name of the Captain of the Vessel?

A. Yes, sir, on the front.

Q. The Captain's name here is Henry Hoeppner. And he was the Master of this vessel, is that correct?

A. Yes.

Q. The address of Captain Hoeppner is given 200 Pine Street, San Francisco, care of Moore-McCormack Steamship Company. To your knowledge is 200 Pine Street the regular Pacific Coast office of Moore-McCormack Company?

A. Yes, sir.

Q. Have you known Captain Hoeppner for some time, Commander?

A. No, I don't remember him other than this—I did not, preside at the signing on of this ship, but I saw him around the office.

Mr. Hicks: No further questions.

Cross-examination:

By Mr. Wood:

Q. Commander Jones, you have been for many years Shipping Commissioner in this port, have you not?

A. That is right.

Q. And in this port during the war the office of Shipping Commissioner was merged with the Coast Guard?

A. That is right.

Q. You are still Commander in the Coast Guard, Shipping Commissioner at this port, in charge of those duties, are you not?

A. That is right.

Q. The duties of the Shipping Commissioner are prescribed by statute, are they not?

A. They are.

Q. And among other things, they are to preside over the signing of Articles between the Master of the ship and the crew, is that right?

A. That is correct.

Q. And to protect the rights of seamen, that is correct, is it not, part of your duties?

[fol. 127] A. That is right,—friend of the seamen.

Q. Friend of the seamen. And the Shipping Articles are by law the contract of employment between the Master of the ship and the crew for that voyage, are they not?

Mr. Hicks: We object to that as calling for a legal conclusion, your Honor.

The Court: Isn't that calling for a legal conclusion?

Mr. Wood: I don't think it is, but I will reframe the question.

Q. What is your understanding of what the Shipping Articles are, Commander?

A. Well, the Shipping Articles are a contract between the Master and the seamen of this ship.

Q. For their employment on that voyage?

A. Covering the terms and also the pay.

Q. And describing their rating on the ship?

A. That is right.

Q. The position they occupy.

A. It gives their Government numbers and certificates they hold to qualify them to do the work; it gives the next of kin; it gives the information concerning allotments to beneficiaries; it gives information as to the voyage; it gives the social security number; it gives everything that might be necessary——

Q. (interrupting) Well, everything that pertains to their employment on that ship is embodied in those articles, is it not?

A. No.

Q. What is not?

A. The union agreements.

Q. Oh, yes, but I mean between the individual and the Master?

A. That is right.

Q. The union agreements you refer to are general overall agreements between the Union and the War Shipping Administration?

A. That is right.

[fol. 128] Q. Covering general conditions of wages, and so forth, are they not?

A. Certain terms are covered in the working agreement that are not shown in the Shipping Articles.

Q. And those union agreements are between the War Shipping Administration and the unions?

A. I don't know just how that is, whether it is with the companies. I think it is with the companies, though, as I remember.

Q. You don't know that?

A. I think it is with the companies. I am not sure.

Q. These Shipping Articles are prescribed by statute, aren't they?

A. That is right, they are, the Federal Code.

Q. And you say you did not preside over the signing of these Articles, yourself?

A. No.

Q. But did one of your deputies?

A. Yes, sir, Harold Ball signed them.

Q. Is it the regular practice of your deputies and yourself when Shipping Articles are signed, that they are read aloud to the crew?

A. That is right.

Q. They have to be, don't they?

A. They have to be, by departments.

Q. By what?

A. Departments; deck department; when we get through with that, we call the engine department. Then we take the steward department, then we take the men that are not there at that time and read it to them separately as they sign.

Q. Now Mr. Hust was a fireman. Will you glance at the list of firemen there and indicate if his signature is there? [fol. 129] A. Yes, it shows on line 43, Cecil D. Hust. The information is given about him, his signature shows there, and also his next of kin.

The Reporter: Isn't it Cecil I. Hust?

Mr. Wood: Cecil I. Hust.

The Witness: Is it?

Mr. Wood: That is all.

Redirect examination.

By Mr. Hicks:

Q. Commander, just a few questions. Now, the functions of the United States Shipping Commissioner com-

manding vessels apply to a boat that is operated, we will say, by one of the steamship companies in its individual capacity, or whether it is operated under what is called in this proceeding the General Agency Agreement, is that correct? Stated otherwise, I suppose if I, myself, were operating a steamship company under my own name and I wanted to get a crew for the vessel, I would have to sign the crew on under the auspices of the Shipping Commissioner, would I not?

A. Not necessarily. If you were going coastwise, according to law you could sign on your own crew as Master of the ship.

Q. Yes, but I am assuming a situation such as the Mark Hanna, where you are going abroad.

A. Foreign articles, the procedure would be the same.

Q. It is the same even in peacetime as it is now in that respect?

A. No difference.

(Agreement between Sailors' Union of the Pacific and Steamship Companies was marked Plaintiff's Exhibit 14 for Identification.)

Q. You mentioned that the Articles do not embrace the entire agreement with respect to the employment of the crew, the Master's relation to them, and so forth, and you [fol. 130] referred to union agreements. I hand you Plaintiff's Exhibit 14 for Identification and ask you to state if that is one of the union agreements to which reference is made?

A. I would not know because we don't have anything to do with that part of it. We just simply know there are agreements because we hear them discussed, but they are not permitted to be in the office, nor are our men permitted to discuss them, because they don't come under our scope.

Q. You mentioned in the regular course it was your understanding that the union agreements are not signed by the War Shipping Administration or by any governmental agency, but are signed by the operator of the ship as the employer?

A. No; I said that was my impression.

Q. Your impression, yes. I hand you Plaintiff's Exhibit 14 for Identification and ask you to examine the first page

of it and state whether or not that confirms your impression or whether that renders any doubt in your mind——

Mr. Wood: (interrupting) Now I object to that, your Honor. The witness has clearly stated he merely has an impression.

Mr. Hicks: I will establish it otherwise, your Honor. That is all.

(Witness excused.)

(At this point a recess was taken until 2:00 P. M. of this day, Monday, May 15, 1944.)

[fol. 131] Portland, Oregon,
Monday, May 15, 1944,
Two o'clock P. M.

William G. Warwick, called as a witness in behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hicks:

Q. Will you tell your full name, please?

A. William Gordon Warwick.

Q. Are you an official of the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association?

A. Yes, I am the Business Agent.

Q. I hand you Plaintiff's Exhibit 14 for Identification and ask if you are familiar with that printed contract?

A. Yes, I am familiar with it.

Q. What is that?

A. That is the agreement under which the Pacific Union sailors are employed on ships, collective bargaining agreement.

Q. What is the fact as to whether or not a copy of this agreement that you have just identified is furnished to each delegate aboard the ship?

A. That is right.

Q. And was that contract operative and in effect in the spring of 1943?

A. Yes, sir.

Q. Was the copy furnished to the delegate that served aboard the Mark Hanna?

A. Yes.

Q. Was this agreement operative and in effect and installed aboard the vessel in October, 1942, when the Mark Hanna sailed?

A. Yes, sir.

Questions by Mr. Wood:

Q. You testify—I am not doubting your word but I want [fol. 132] to understand things—that a copy of this agreement was aboard the ship when she sailed?

A. A copy of that is placed aboard every vessel.

Q. Every vessel that comes under the agreement?

A. That is, under the agreement with the operators that are signatory to that agreement.

Q. Does that also apply to War Shipping Administration vessels?

A. It applies to every vessel that comes under the agreement, that is signatory to that agreement.

Q. Well, I don't know whether that is an answer to my question. Is this placed on every War Shipping Administration vessel, for example, that sails out of this port?

A. Well, I don't understand the question, what you mean by War Shipping Administration vessels. They are all War Shipping Administration vessels. It is placed on every vessel.

Q. Well, some vessels are owned by the United States Maritime Commission and operated by the War Shipping Administration, and some are owned by private owners but they have been requisitioned by the War Shipping Administration.

A. That is right.

Q. So they are all, you might say, in the hands of the Government.

A. That is true.

Q. You mean this book is placed on every such ship?

A. It is placed on every such ship that is signatory to that agreement.

Mr. Wood: All right.

By Mr. Hicks:

Q. And it is this agreement that governs the union relationship on working conditions and that sort of thing as

between the company on the one hand and the union and its membership on the other?

A. That is right.

[fol. 133] Questions by Mr. Wood:

Q. I am not clear yet. Do you imply that there are some War Shipping Administration vessels which are not subject to the agreement?

A. Yes, that is true.

Q. What are those?

A. Those are vessels that come under different unions; like the National Maritime Union, which has headquarters on the Atlantic Coast might have companies signatory to their agreements which would operate vessels off this coast. They would not be a signatory to that agreement.

Q. I understand that. Some are under Atlantic Coast agreements and some under Pacific Coast agreements?

A. That is right.

Q. Do you place these aboard the ships, yourself?

A. Yes.

Q. Did you place one of these aboard the Mark Hanna?

A. I don't say I personally placed it on there. I gave it to one of the crew members who acts as a delegate for that vessel.

Q. Well, do I understand from that, that that vessel was under the Pacific Coast, and not the Atlantic Coast agreement?

A. That is right.

Q. Have you verified that from your records to refresh your memory, or are you just speaking from memory?

A. No, the S. S. Mark Hanna was under agreement to us. We furnished the crew for that purpose.

Q. Under the Pacific Coast agreement?

A. Pacific Coast Marine Firemen, yes.

(Agreement between Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association and Steamship Companies was marked Plaintiff's Exhibit 15 for Ident.)

[fol. 134] By Mr. Hicks:

Q. I hand you Plaintiff's Exhibit 15 for Ident., Mr. Warwick. Will you please identify that for us?

A. This is a collective bargaining agreement that governs all vessels under agreement with us, for the unlicensed engine room department.

Q. Was that operative in October, 1942 for the voyage of the Mark Hanna under the auspices of the Moore-McCormack Lines?

A. Yes, sir.

Q. And what you have said with respect to Plaintiff's Exhibit 14 would likewise apply to that, would it?

A. That is right.

Q. That is the union with respect to which you are the union representative, isn't it?

A. That is right.

Q. Is that the contract which governs the union relationships between the employer and the union and its membership?

A. That is right.

Q. On the voyage of the Mark Hanna which began in October, 1942 and ended in 1943?

A. Yes, sir.

Q. And I assume a copy of that was aboard the vessel?

A. Yes, sir.

Q. In the hands of the delegate?

A. Yes, sir.

Q. And the men were dispatched to the vessel by you?

A. Yes, sir.

Q. The men are furnished to the vessel upon request of whom?

A. By the steamship company operating the vessel.

Q. In this instance that would be whom?

A. Moore-McCormack Steamship Company.

[fol. 135] Questions by Mr. Wood:

Q. You mean they would telephone or send word down to your union to dispatch so many men to this ship?

A. They would telephone us, yes, as a rule.

Q. One of these agreements is for the Sailors Union and one for the Marine Firemen. Are you representing both these unions?

A. No, just the Marine Firemen.

Q. Then when you testified that you either personally or through your agent placed the Sailors Union agreement on the ship, were you stepping outside your functions?

A. No, not necessarily. Both organizations are in the same dispatching hall and we just work hand in glove, you might say, with each other.

By Mr. Hicks:

Q. Mr. Warwick, I call your attention to page 4 of Exhibit 15, and observe that the Moore-McCormack Lines, Inc., a corporation, is not named on there as signatory. Can you explain that to us, please?

Mr. Wood: Could you delay your answer until I see what he is asking you about?

Mr. Hicks: Yes. (indicating on the exhibit.)

Q. Do you understand my question?

A. Do you mean what company is referred to in this agreement?

Q. Yes. I notice specifically Moore-McCormack Lines is not named there as signatory to the agreement.

A. The reason for that, in Pacific Coast trade they operate under the name of the Pacific Republics Line; that is for Pacific Coast trade. On the Atlantic Coast they assume a different operating name.

Q. But the Pacific Republics Line for coastwise trade is Moore-McCormack Lines, is that correct?

A. Not for coastwise trade; for ships operating out of the Pacific Coast ports.

[fol. 136] Q. And I call your attention to page 3 of Plaintiff's Exhibit 14 and ask you to make observation concerning the designation there of Pacific Republics Line as Moore-McCormack Lines, Inc.

A. That is right. It is in parenthesis referred to as Moore-McCormack. Ours is just Pacific Republics Line.

Q. And during your experience as Business Representative of your union, and throughout 1943 the Moore-McCormack Lines, Inc., the defendant here, operated under that agreement that you just identified?

A. That is right.

Q. And you, as business representative, dispatched men to the ship upon call of Moore-McCormack Lines, Inc. for such men?

A. That is right.

Mr. Hicks: That is all.

Cross-examination.

By Mr. Wood:

Q. When you say Moore-McCormack Lines, Inc., operate under these agreements, just what do you mean by that?

A. Well, prior to the war every company on the Pacific Coast, that is, the majority of them, were under contract to the Pacific Coast Marine Firemen, of which Moore-McCormack was one, and for the duration of the war, in Washington, D. C. a practice policy was drawn up where the agreements would be frozen for the duration of the war, and all the operators that are signatory to that agreement would remain signatory for the duration, and various companies which we refer to as operators are the companies—the particular company that is operating that particular vessel.

Q. I have here that regulation you refer to, but I will let my friend get the rest of his agreements over first. You have just referred to that operation regulation—you said, [fol. 137] freezing these agreements. I will ask you to look at that and see if that is a copy of it (handing a document to the witness).

A. No, this is not familiar to me at all. We have nothing whatsoever to do with the War Shipping Administration. Ours is directly between the steamship company operating the vessel and the Union.

Q. What did you mean then by saying that the Government, when the war came on and the Government was assigning ships to these operators, what did you mean by saying that the Government had the operators freeze the agreements?

A. They didn't have the operators—the Government froze our collective bargaining agreements with the operators, so that they would remain intact for the duration of the war.

Q. How did the Government do that?

A. It was signed by the President of the United States as a memorandum signed to that effect.

Q. You don't know the exact mechanics that the Government went through to freeze these agreements, do you?

A. Only to the extent that the wages, working conditions, collective bargaining agreements—as far as freezing of the vessels themselves, I don't know. What I am talking about

now is the working conditions of the unlicensed personnel. When I am talking about freezing, I am talking about freezing their working conditions, their overtime rates, and collective bargaining agreements.

Q. I know that, but I say, you don't know what Government official signed the paper to carry that into effect?

A. The President of the United States signed it.

Q. You don't know that, do you?

A. Yes, I know it. I was notified to that effect from Washington, D. C.

Mr. Wood: That is all.

[fol. 138] Redirect examination.

By Mr. Hicks:

Q. Just one other question, Mr. Warwick. In supplying men to the ships—I am referring particularly to the Mark Hanna and other similar vessels—were your contracts with respect to hiring men, and so forth, at any time with the War Shipping Administration?

A. No. The only thing, if we don't have enough men in one particular case, we happen to run short, we call the War Shipping Administration for replacements. We ourselves call them. As far as anything else for the War Shipping Administration, we don't come in contact with them at all.

Q. If men should be supplied by the Government division, the War Shipping Administration, they would clear through the unions?

A. That is right, yes.

Q. But with respect to any questions that arise as to manning vessels, and so forth, you deal with Moore-McCormack, Inc., do you, rather than some representative of the War Shipping Administration?

A. We deal directly with the Moore McCormack Lines.

Q. That is always true?

A. That has always been the practice.

Mr. Hicks: That is all.

Recross-examination.

By Mr. Wood:

Q. Mr. Malone is the Secretary of your Union, isn't he?

A. He is, in San Francisco. Our main headquarters is in San Francisco.

Q. I know, but he is the Secretary, isn't he?
A. That is right, he is the Secretary.

Mr. Wood: That is all.

(Witness excused.)

[fol. 139] DONALD CAMERON, a witness in behalf of plaintiff, thereupon resumed the stand, and further testified, as follows:

Direct examination (continued).

By Mr. Hicks:

Mr. Hicks: Mr. Reporter, will you read the last question?

(The reporter read the last question and answer in the testimony of this witness, page 108 of this transcript.)

Q. Will you pick up the thread from there, Mr. Cameron, and continue on.

A. As soon as I reached the end of the line I heard a groan and a thud—I heard the thud and then the groan, and right away I knew what had happened, so I immediately hollered to the top deck for an emergency light so I could see what had happened, and it was some time—it was a few minutes before the emergency light arrived; and in the meantime some of the other crew, some of the rest of the crew had gone below in the dark down to where Mr. Hust was, and when they did bring the light, we could see what the situation was down there.

Q. Now you mentioned that it was dark in the locker room. I don't remember whether you said how dark it was. I wish you would clarify that for us.

A. It is pretty hard—coming in from the daylight it would be pretty hard to see in there unless you were familiar with it. It was what you would call dark, coming in from the daylight.

Q. Was there any light admitted down through the hatch from the first deck?

A. Not very much. The hatch was wide open but there are obstructions in the way that prevent the full effect of the light from coming into the locker room.

Q. What is the obstruction you speak of?

[fol. 140] A. Well, there is a V-shaped stanchion and the two hawse pipes that go down to hold the anchor against the bow of the ship. They are huge pipes and they obstruct the whole entrance practically.

Q. And that prevents, to some extent at least, the light coming down the hatch?

A. Yes, it does, very much.

Q. Do you remember what kind of a day this was?

A. I remember it was overcast; it was early in the morning, and it was overcast. It was quite a dreary day.

Q. Do you remember about what time of the day it occurred?

A. It was in the morning. It was early in the morning, that is all, I don't know the exact time.

Q. Now, to what point in the locker room had you reached when you heard the thud, the fall you described?

A. I had just reached the line, to where the line was stored. I had just gotten there, got to the line.

Q. Did you know who it was that was coming down behind you to assist in obtaining the mooring line?

A. No, I didn't know at the time. I did afterwards.

Q. Did you give any warning to the man that was behind you, that happened to be Mr. Hust?

A. No, I didn't.

Q. Will you tell us how it was that you didn't?

A. Well, only the deck department are the only ones that ever go in there, and naturally, when we started down, I thought that someone from the deck department was following me, because that was our work, but all hands were turned to, and I didn't stop to think that maybe some other member of the crew was following me that wasn't familiar with the locker room.

[fol. 141] Q. And you didn't know it was Mr. Hust that was joining you to execute the order until after he had fallen?

A. That is right, I didn't know who it was.

Q. Was the condition such that you could see the open hatch in the room?

A. Well, it would have been pretty hard to see, and to a stranger, they couldn't have seen it at all. I, myself, would have had to look pretty sharp to see it.

Q. Of course, you knew——

A. (interrupting) I knew exactly where it was.

Q. Did you know at the time you went down there that the safety chain had been removed from the stanchions?

A. Yes, I did.

Q. Can you tell us how long before, if you know, the safety chain had been removed?

A. No, I can't. I remember removing the chain—helping them remove the chain, but I don't remember whether it was the day before or two days before.

Q. You actually assisted in removing the chain?

A. I actually helped in removing the chain.

Q. Do you know who it was gave you the order to remove the chain?

A. Yes, I am pretty sure it was the Captain. He was on the forecastle head working with us all the time.

Q. Was any order given with respect to putting another chain or a rope as a safety guard around the stanchions?

A. No, there was not.

Q. Then to your knowledge after the chain was removed, nothing was placed there until after Mr. Hust had fallen down?

A. I know there was nothing placed there.

Q. And you don't know whether it was one day before or [fol. 142] two days, that the safety chain had been removed?

A. That is right, I don't know how many days.

Q. Have you been in the locker rooms of other Liberty vessels than the Mark Hanna?

A. Yes, since then.

Q. And are they all constructed to a standard pattern?

A. Yes, all very similar.

Q. And on the other vessels you observed, and referring to the locker rooms, were the safety chains installed upon the stanchions around the open hatch?

A. Always.

Q. Were there any ropes available in the locker room which could readily have been used as a safety chain—or to go around the stanchions?

A. Yes, there were.

Q. Was this order that you and Mr. Hust were executing—were you performing that work at any particular speed?

A. Well, as I remember, the tug was standing by and the whole work was more or less an emergency, and naturally we hurried to carry out the order, because those things must be done quite fast. I mean, the tug standing by, you

naturally would hurry. I don't think we were rushing about blindly, but we were hurrying.

Q. In receiving your pay for your wages, in what form were you paid, as a member of the crew of the Mark Hanna, during this period with which we are concerned?

A. How do you mean, in what form?

Q. In what form, were you paid in cash?

A. Yes, we were paid in cash.

Q. Was your cash or your currency contained in envelopes similar to those marked Plaintiff's Exhibit 2 (handing the exhibit to the witness)?

[fol. 143] A. Yes, just exactly; just like that.

Q. And in the payments that were made to you, were notations made on each of the envelopes as to the amount of deductions that were retained by the employer?

A. Yes.

Q. And that applied as to the Victory tax and S. S. tax?

A. Yes, it did.

Q. What is the S. S. tax?

A. Social security, I believe.

Q. Now, the Victory tax was retained by the employer, as I understand it, as a basis for supplying the Government a proportionate share of your tax due from your income, is that right?

A. Yes.

Q. Was that retained by the Moore-McCormack Company, to your knowledge?

A. That was. It was deducted from those envelopes. The deductions were right on.

Mr. Hicks: Will you mark this for identification?

(Statement of income tax withheld on wages was marked Plaintiff's Exhibit 16 for Identification.)

Q. Mr. Cameron, did you write a letter to the Moore-McCormack Lines in connection with your social security matters and income tax matters?

A. Yes. • • •

• • • • • • •

Q. Mr. Cameron, you mentioned receiving a letter from Moore-McCormack Lines, Inc. concerning the inquiry you made; is that correct?

A. Yes.

Q. Have you endeavored to find that letter?

A. I have tried.

Q. Did you destroy the letter, to your knowledge?

[fol. 144] A. I believe I did. I remember one day after I paid my taxes I was clearing everything up, you know, odds and ends laying around, and I believe I destroyed that letter, because it was right in with those papers, and I can't find any of the papers now. I destroyed everything but my receipts for the tax.

Q. Will you tell us what office of the Moore-McCormack Lines the letter was sent from?

A. New York.

Q. Do you remember distinctly the contents of the letter?

A. Well, I told you just about the exact words of the letter.

Q. Well, do you remember the contents of the letter specifically?

A. Not word for word.

Q. Well, do you feel you recollect it with accuracy?

A. Yes—The answer they gave to me?

Q. Yes.

A. Well, just a regular form, and it said, "You failed to furnish us with your social security number, by which all of our employees' accounts are—" I don't know what word they used there— "all of our employees' accounts are filed," is what it meant. It said, "If you will please forward this information, we will attend to the matter immediately."

Q. And did you forward the information?

A. Yes, I did.

Q. I hand you Plaintiff's Exhibit 16 for Identification and ask you to state what that is.

A. This is the statement of income tax withheld on my wages, they sent me after I sent them my social security number.

Q. That was sent you by Moore-McCormack Lines, Inc. in response to your letter to them?

A. Yes.

[fol. 145] Q. And this was received by you by mail?

A. Yes, sir, it was received by me, by mail.

Q. And that answered the question you inquired of them?

A. That is right.

Q. That was so you could pay your income tax and properly allocate your income?
A. Yes.

Mr. Hicks: We offer Plaintiff's Exhibit 16 in evidence, your Honor.
Mr. Wood: No objection.
The Court: It will be received.

(The statement of income tax withheld, previously marked Plaintiff's Exhibit 16 for Identification, was received in evidence.)

[fol. 146] Cecil I. Hust, the plaintiff, recalled as a witness in his own behalf, further testified as follows:

Direct examination.

By Mr. Hicks:

Q. Mr. Hust, were deductions made from your wages by Moore-McCormack Lines, Inc.?
A. Yes, sir.
Q. And were those deductions made with respect to every time you received payment from the company of your wages?
A. It was made in the final payoff.
Q. And the amounts were reported to you by the company on the envelopes in which you received the currency?
A. Yes, sir.
Q. Envelopes of the type shown by Plaintiff's Exhibit 2?
A. Yes, sir.

Mr. Hicks: That is all, Mr. Hust, thank you.

Cross-examination.

By Mr. Wood:

* * * * * * * *

Q. Now, about these Articles, these Ship's Articles, you understood when you signed them, did you not, that they were your contract of employment?
A. Yes, sir.

Mr. Wood: That is all.

Redirect examination.

By Mr. Hicks:

Q. Just one question there. What was it you say you understood about the Ship's Articles, Mr. Hust?

A. That they were the contract which we were to sail under.

[fol. 147] Q. Did you understand that the Articles constituted the whole contract between yourself, as a member of the crew——

A. (interrupting) No, sir.

Q. Did you know as a matter of fact, there are certain laws which go into the contract, which are operative as a matter of law?

A. Yes, sir.

Q. Did you know about the effect of any of your union agreements?

A. I knew our union agreement was also considered.

Q. Were you ever told by any member of the Moore-McCormack Lines, or any executive, anyone representing them, that you were other than an employee of that company?

A. No, sir.

Q. You understood you were such an employee?

A. Yes, sir.

Q. Mr. Hust, upon returning here to Portland, and in August, 1943, did you contact the Moore-McCormack Lines' local representative, Mr. Tripp?

A. Yes, sir.

Q. And did you report to Mr. Tripp that you had been injured aboard the Mark Hanna?

A. Yes, sir.

Mr. Hicks: Will you mark this, please?

(Letter from K. C. Tripp, Mgr. Moore-McCormack Lines, to Hust, dated August 24, 1943, with copy of letter from H. W. Dubbin to K. C. Tripp, and copy of letter Aug. 14, 1943 from War Shipping Administration to Moore-McCormack Lines, attached, was marked Plaintiff's Exhibit 17 for Identification.)

Q. What, if anything, did Mr. Tripp tell you with respect to the claim you made at that time?

A. He said the only thing he could do personally was to [fol. 148] to contact their office, San Francisco, I believe he said.

Q. Did he state that he would do that and later inform you?

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit 17 for Identification and ask you to state what that is.

A. That is the letter I received from Mr. Tripp.

Q. Now, there are two enclosures, or two papers attached to the letter. Were those enclosed in the envelope with the letter? Examine them, please.

A. Yes, sir.

Q. And those are the documents which were sent you by Mr. Tripp, I take it, in response to the inquiry you made of him?

A. Yes, sir.

Q. Just one other question: Mr. Tripp, you knew him as the local Manager for the Moore-McCormack Lines, Inc., is that correct?

A. Yes, sir.

Q. And he was serving in that capacity at the time you presented your inquiry, is that correct?

A. Yes, sir.

Mr. Hicks: I guess we may stipulate he is still the local Manager.

Mr. Wood: The city Manager.

* * * * * * *

Recross examination.

By Mr. Wood:

Q. Mr. Hust, when you said a moment ago in answer to Mr. Hicks' questions, that you did not understand that the ship's Articles were the whole contract of employment, and that you understood the union agreements came into it, what part of the union agreements, or what terms or anything in them did you think came into this contract of employment of yours?

[fol. 149] A. By the union agreements?

Q. Yes.

A. Well, that has quite a bit to do with your agreements on the ships as far as living conditions and everything concerned with the ship, sailing at sea——

Mr. Hicks: (interrupting) Speak a little louder, please.

A. That has lot to do with the ship and the crew and the Master.

Q. What elements in this union agreement did you think formed a part of your contract of employment or affected it in any way?

A. I beg pardon?

Q. What part of those union agreements did you think affected your contract of employment under the ship's Articles?

Mr. Hicks: May I hand him the copy (handing exhibit to the witness)?

A. Well, there are different things that come up aboard a ship that is referred to the union agreement almost every day.

Q. Well, what are they?

A. Your living conditions, the food the company puts aboard the ship, the stewards put out to you, and the safety rules and regulations.

Q. Your wages are stipulated in the Articles, aren't they?

A. That is right.

Q. They are not in the union agreement?

A. No, sir.

Q. And the voyage is stipulated in the Articles?

A. Yes, sir.

Q. That is not in the union agreement?

A. No, sir, I don't think so.

Q. And the employment by the Master is stated in the Articles, isn't it?

A. Yes, sir.

Q. That is not in the union agreement?

A. No, sir.

Q. Well, have you stated everything you can think of in [fol. 150] the union agreement that affected this contract? You said living conditions, and conditions aboard the ship.

* * * * * * *

Q. I want to know if there is anything else in the union agreement other than you have stated, that you think affected your contract of employment.

A. Well, I don't know of anything, Mr. Wood.

Mr. Wood: Thank you.

A. I am not too familiar with the Articles. In fact, I don't believe I ever read them.

Q. They were read aloud to you. Let's see, I had one more question I wanted to ask you. You mentioned certain laws when Mr. Hicks questioned you, certain laws you had in mind as forming part of your contract of employment when you signed those ship's Articles. What law did you mean?

Mr. Hicks: I beg your pardon, Mr. Wood, either I misunderstood my own question or you misunderstood his answer. I asked if he understood there were certain laws which affected the relationships, as a matter of law, and everything contained in the Articles, to which he answered "Yes." Certainly I did not intend to ask, and I don't think he responded, in respect to any particular law.

Q. Was that your answer; you just knew there were some kind of laws that affected your contract?

A. Yes.

Q. But you didn't know what they were?

A. No, sir.

Mr. Wood: Thank you, very much.

(Witness excused.)

[fol. 151] OFFER OF EXHIBITS

Mr. Hicks: There are certain contracts, your Honor, we have stipulated may be later received, subject to Mr. Wood's same objection, and so forth.

Mr. Wood: Subject to objection.

Mr. Hicks: Subject to Mr. Wood's objection.

Mr. Wood: Except as to identification. I am not going to raise any question as to the identification.

Mr. Hicks: Yes, I understand. And reserving the right to offer those, subject to Mr. Wood's objection, we rest, your

Honor, seeking the opportunity to put those in more or less out of order, subject to appropriate objections.

Mr. Wood: No objection to that procedure.

(At this point a short recess was taken.)

Mr. Hicks: If the Court please, the contracts I mentioned in closing have now been obtained, and counsel concedes them.

(The agreements were marked Plaintiff's Exhibits 18, 19, and 20 for Identification.)

Mr. Hicks: We offer in evidence, your Honor, Plaintiff's Exhibits numbered 18, 19, and 20, and we offer the stipulation of counsel that these exhibits, which are union agreements with various unions which supply, and did supply, personnel to the Mark Hanna and other vessels similarly situated, are the agreements, and that they stand in relative and similar position, if not identical position, to the other agreements which have already gone in evidence. And it may be stipulated that the identification of the exhibits may be waived.

Mr. Wood: That is right.

The Court: Your others have not been offered. Those identified by Mr. Warwick have not been offered.

Mr. Hicks: I thought they had, your Honor. I will offer them with the others at this time.

Mr. Wood: I have no objection other than the formal one, [fol. 152] I think they are incompetent and irrelevant.

The Court: You offer no objection to the mode of identification?

Mr. Wood: No.

The Court: But you object to their being in evidence.

Mr. Wood: I think they are irrelevant and immaterial to the issues.

The Court: Very well; they will be received, subject to the objections.

(Agreements between Sailors' Union of the Pacific and Steamship Companies, and between Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association and Steamship Companies, previously marked for identification, were received in evidence marked Plaintiff's Exhibits 14 and 15.)

(Agreement between Marine Engineers' Beneficial Ass'n. and Pacific American Shipowners Association was received in evidence, marked Plaintiff's Exhibit 18.

Agreement between Marine Cooks & Stewards' Ass'n. of the Pacific Coast and Steamship Companies was received in evidence, marked Plaintiff's Exhibit 19.

Agreement between Master, Mates & Pilots of America and Steamship Companies was received in evidence, marked Plaintiff's Exhibit 20.)

Mr. Hicks: We rest, your Honor.

Plaintiff rests.

[fol. 153] DEFENDANT'S EVIDENCE

K. C. TRIPP, called as a witness in behalf of defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wood:

Q. Mr. Tripp, you reside in Portland at the present time, do you not?
A. Yes, sir.
Q. What is your occupation here?
A. Manager of Moore-McCormack Lines in Portland.
Q. Local manager here in Portland for that company?
A. Yes.
Q. How long have you occupied that position here in Portland, Mr. Tripp?
A. Since October 21, 1942.

Mr. Wood: I will have this marked for identification.

(Service Agreement (GAA 4-4-42) between the War Shipping Administration and Moore-McCormack Lines, Inc., was marked Defendant's Exhibit 21 for Identification.)

Q. I hand you a paper, Mr. Tripp, that has been marked by the clerk Defendant's Exhibit 21 for Identification, and ask you please to state what it is,—that is all, just identify it (handing the document to the witness).

A. This is a service agreement made between the War Shipping Administration and Moore-McCormack Lines, Inc., for the operation of such vessels as are allocated to our company to operate on behalf of the War Shipping Administration.

Q. And was the Mark Hanna one of the vessels that was so allocated to you?

A. It was, sir.

Q. Under that agreement.

A. That is correct.

Q. And to be specific, at the time the Mark Hanna sailed [fol. 154] out of here with Mr. Hust aboard as a fireman, this was the agreement that governed your relations to that ship and to the War Shipping Administration, is it?

A. That is correct.

Mr. Wood: I offer the agreement in evidence.

Mr. Hicks: No objection to it being received.

The Court: It will be received.

(The Service Agreement (GAA 4-4-42) between the War Shipping Administration and Moore-McCormack Lines, previously marked Defendant's Exhibit 21 for Identification, was received in evidence.)

Q. Mr. Tripp, I wish you would in a few brief words, without too much detail, explain what is the duty of the agent under this agreement, and particularly what is meant by the phrase, "conducting the business of the vessel" for the War Shipping Administration.

Mr. Hicks: Your Honor, I assume the purpose of the question is to ask Mr. Tripp to place a construction upon the legal effect of the——

Mr. Wood: (interrupting) No, it is not. The contract speaks for itself. I don't care,—I thought you were going to ask the same question.

Q. I was going to ask you, and intended to ask you, Mr. Tripp, as a matter of practice under that agreement, what does your company do?

Mr. Hicks: That is all right. We withdraw the objection.

A. We represent the vessel as the normal business agent, attending to all such matters that the Master, the Captain——

Q. (interrupting) Now, this jury isn't a lot of seamen. Who do you mean by the Master?

A. The Master, or the Captain, as I was explaining, might wish done. Those matters concern the employment of a crew, the carrying of stores for the deck, the engine, and the steward's departments, the docking of his vessel. When it is our duty to assist him in the loading of the vessel, we accept his instructions as to the method he wants the vessel loaded, how, when, and where. If we are representing the vessel so far as the cargo is concerned, we would [fol. 155] execute bills of lading on behalf of the War Shipping Administration in general, but the Master in particular. The bills of lading all have the Master's signature, and we act in most cases as his agent.

Q. Who collects the money due for carrying cargoes of the ship; who collects the freights?

A. We, as agent, if there were any moneys collected. Of course, there are no moneys collected at the present time. That is being done through accounting, and our entire procedure is accounting today. But if we were required—and there have been instances where freight money has been collected—we would collect it for the account of the War Shipping Administration, making a direct accounting to them, over the Master's signature, of course, for whatever money we receive or whatever moneys we pay out.

Q. Let me ask you, the War Shipping Administration prescribes a special form of accounting for you, does it not?

A. On all types of fiscal arrangements, either money received or money paid out for them. There are many such forms. We are strictly an accounting office today; under the operation of these vessels for the War Shipping Administration, it is practically all accounting.

Q. Why did you say that seldom nowadays are any moneys collected for freights? You said it was all a matter of accounting.

A. There are many military cargoes carried, Mr. Wood. The arrangement of freight money is a private arrangement within the War Shipping Administration and the military organization involved. It may be the Army or the Navy, principally the Army and Navy, sometimes the Air Corps. There have been cases in some of these vessels where certain types of Lend Lease cargo, or what is called a commercial cargo at the present time—it differs slightly

from Lend Lease—but where, through the Board of Economic Warfare, certain cargo is either permitted to be sent out of this country, or received into this country, in other words, exported when it goes out, and imported when it [fol. 156] comes back, and there are collections that are made for that, and, of course, we must in turn report that to the War Shipping Administration, through the proper auditor's office.

Q. You do then, as agent, handle the cargo business of the ship?

A. Yes, sir.

Q. It may be for the Army or the Navy, or for some Lend Lease or something else?

A. That is true, and whatever our disbursements may be—I might add to that for the benefit of the ary—the furnishing of stores, as we call it—it is commonly called storing a vessel——

Q. (interrupting) Now, just what does that mean? These are landsmen.

A. I am reaching that point. When we furnish materials, for instance, for the steward's department, foodstuffs for the ship, we buy locally here and furnish the supplier, or the vendor, people who sell that merchandise, a requisition. When they furnish an invoice, the invoice must be sent by the Master, a delivery receipt for that merchandise must be signed for, by either the Master or the Chief Officer, who certify that that material has been received aboard the vessel, and in turn, when we pay for that, we must then turn those bills over to the War Shipping Administration, who reimburse our account.

Q. Then when you speak of supplying a vessel, you mean the food put aboard her, the linen that is put aboard for the crew?

A. That is correct.

Q. Or the extra rope or chains, whatever has to be put aboard, you would put that aboard, that is, supplying it, and you pay out the money for that and are reimbursed by the War Shipping Administration?

A. That is correct. We receive those requisitions either from the deck department, the steward's department, or the engine department.

Q. You said, I believe, you were concerned with the employment of the crew. Just what do you mean by that?

A. Well, the Master calls upon us for such crew mem-

[fol. 157] bers as he wished to have, and because of our familiarity in this port or any port that we would be located, as an agent, we look to the proper union hall for those particular members and send them to the vessel, where the Master accepts them or rejects them, as the case may be. After we ask those men, for the Master, to go to the vessel, we have no further interest in them, whether he accepts them or rejects them. He signs them on down there.

Q. Is that what you mean—I used the phrase in the agreement, itself, by "procuring crews for the vessel"?

A. That is correct. That is the common phrase. We procure the stores, we procure any and all services; we procure his crew members, at the Master's direction, of course.

Q. Yes. It says, "The general Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel." That is what you are referring to?

A. That is correct.

Q. Some slips of paper have been introduced here by the plaintiff. I pick up Plaintiff's Exhibit 2; they appear to be pay envelopes that Mr. Hust said he received his cash pay in from the purser, and on the top of those you notice the name "Moore-McCormack, Inc." is printed, without any designation as agent, or without any reference to the War Shipping Administration. Can you explain how that came about?

A. Yes, I think I can answer that satisfactorily. At the time the war broke out, and all of the vessels then operated by our line, or any line, were requisitioned and taken over by the United States Government and directly controlled by the War Shipping Administration as the operating agent of the Government; we necessarily used available stationery and slips and vouchers of this nature, for the obvious advantage of having something that was normally used; but for all of these expenses we received our money back from the War Shipping Administration in due course. We have, no doubt, a great deal of other stationery we use in the operation. It does not specifically have any other designation, but it is a saving of money; and there is a [fol. 158] question, of course, whether or not the additional printing would serve any purpose, or even be reimbursable by the War Shipping Administration.

Q. As a matter of economy, then, you had some stationery on hand and you used it?

A. That is correct. These are bought in tremendous quantities.

Q. I will show you two more things, Plaintiff's Exhibit 16, a social security slip, and a crew pass and muster card, Plaintiff's Exhibit 1. You notice the same thing, Moore-McCormack name is on there.

A. That is right.

Q. And nothing more. Does the same explanation apply to this?

A. That is quite true. As agents, we are looking after some twenty-eight thousand people, and when you have twenty-eight thousand people to deal with, the volume of supplies is great, and those things are bought in quantities, and of course, they are carried over. When anything runs out——

Q. (Interrupting.) In other words, you had them all on hand when you took these ships over?

A. Yes, sir. We buy in tremendous quantities, we must buy in tremendous quantities, and there is a great deal of that stationery. Otherwise, it is on hand, and there doesn't seem to be any more money than we are constantly spending for this sort of thing.

Mr. Wood: You may cross-examine.

Cross-examination.

By Mr. Hicks:

Q. Mr. Tripp, referring to the exhibit Plaintiff's No. 16, you heard the young man testify this was supplied to him in March, 1944, didn't you?

A. That is right.

Q. And supplied to him through the New York office of your company?

A. That is correct.

Q. And you don't question that at all, do you? Do you want to examine it closely?

A. I have seen it, sir.

[fol. 159] Q. Now, do you have information from the New York office that these matters were held over from 1941 and they were simply filled out to avoid the matter of further printing costs?

A. Yes, I have no doubt—we were just——

Q. (Interrupting.) Now answer my question. Do you have information *to* that regard?

A. Not definitely about this, but I am generally familiar with the supplies we have.

Q. Do you have any information at all as to the amount of these particular items that were on hand in December, 1941, this form of notice (indicating)?

A. No.

Q. You haven't. You don't know but what that might have been printed late in 1943 or early in 1944; you have no way of knowing, do you?

A. No.

Mr. Hicks: May I have the original file, your Honor, the original Answer?

Q. Mr. Tripp, the original Answer in this case contains your verification, in which you say, "I, K. C. Tripp" and so forth, "say, I am the District Agent, and the foregoing Answer is true." Do you recognize your signature there (indicating)?

A. Yes, sir.

Q. And you read this before you verified it, Mr. Tripp, and you are familiar with the contents?

A. I will have to read it again to familiarize myself with it.

Q. Maybe you had better familiarize yourself with it, because I want to ask you some questions about it (handing the Answer to the witness). It is alleged in paragraph I that the Moore-McCormack Lines "admits that at the time of the accident alleged, it was operating the Liberty ship S. S. MARK HANNA for and on behalf of the United States of America, representing the War Shipping Administration, under a written agency agreement prescribing and limiting the duties, authority, and functions of this [fol. 160] defendant." And it is alleged in paragraph III, Mr. Tripp, as you will recall, that the plaintiff, Mr. Hust, was not in the employment of the defendant, Moore-McCormack Lines. Now I ask you this: it was by virtue of the general Agency Agreement which has just been received in evidence that you predicated that part of the Answer, is that correct?

A. That is correct.

Q. The general Agency Agreement. Now, you are the District Manager for the Moore-McCormack Lines, is that correct?

A. That is correct.

Q. Do you serve in any executive capacity with the corporation, aside from District Manager?

A. No, I do not.

Q. From whom do you receive your pay; are you paid by the Moore-McCormack Lines, Inc., or by the United States Government?

A. I receive my pay from the Moore-McCormack Lines. I don't know how they are reimbursed.

Q. This General Agency Agreement is not the whole agreement with respect to the operation of the vessels by the Moore McCormack Lines, is it; is there anything in this agreement concerning compensation that the Moore-McCormack Lines receives for operating the vessel as general agents?

Mr. Wood: That is subject to the decision of the War Shipping Administration, I think.

Q. Maybe you can tell us what the basis of compensation is.

A. I don't think I could.

Q. It is cost plus, isn't it?

Mr. Wood: I object to this testimony, and the agreement will speak for itself. I believe that refers to fiscal regulations, which are available at the War Shipping Administration.

Q. Well, you have seen the agreement, haven't you?

Mr. Wood: I object to the question. The agreement speaks for itself.

The Court: Is this a matter going outside the agreement? [fol. 161] Mr. Hicks: Yes, but Mr. Wood developed the methods of operation under the agreement. I want to go on further and find out how the gentlemen operate under the agreement. That is my question, and I assume he knows the answer. I am asking specifically how his company is reimbursed, and that is not within the purview of this contract, at least, it is not contained in the instrument.

Q. It is cost plus, is it not?

Mr. Wood: I object to that as immaterial.

The Court: As to how they are reimbursed, you may answer that, if you know.

A. Your Honor, I don't specifically have the details; but that is prescribed by fiscal regulations. How our company is reimbursed is—I don't know just how to answer that in connection with a vessel. I know what the reimbursement is for expenses to a vessel. But when counsel inquires as to the compensation of our company, that is something I can't answer at this time without referring to other regulations of the War Shipping Administration.

Q. Could you go this far, Mr. Tripp, and state whether or not, to your knowledge, these boats are operated, as general agents, on a fee basis payable to the Moore-McCormack Lines?

A. I don't believe I can give a very intelligent answer to that, because I would have to look at the fiscal regulations. Those are available, but I could not give you that exactly. I know how our expenses are reimbursed for outlays for the vessel, but so far as the company is concerned, I would have to look that up.

Mr. Wood: If your Honor please, this is purely a question of whether this plaintiff was employed by this company or the United States Government. How this company may be reimbursed or paid for its services is certainly without the issues in this case, and I object to this line of testimony, and all of it.

The Court: Well, the witness has stated that he doesn't know.

Mr. Wood: I object to the question. Don't answer unless [fol. 162] the Court instructs you to.

The Court: The question has been answered. The Court's impression was, the witness stated he could not answer from the information he had. I was of the impression he had to look through the contract to see if there was something in the contract that would clarify the situation.

Mr. Wood: The contract speaks for itself, your Honor,—not from this witness' mouth.

The Court: We are just allowing the witness time to look at the contract.

Q. I believe you testified that you are an agent of the Moore-McCormack Company and not of the War Shipping

Administration. You get your orders and directions from Moore-McCormack Lines executives, do you not?

A. That is correct.

Q. And they pay you?

A. That is correct.

Q. Now, clause (c) of Article 3A—will you take the contract, please—provides that Moore-McCormack Lines shall "equip, victual, supply and maintain the vessels," and so forth. Now, who is it that buys the supplies, maintains them and arranges for their delivery aboard the vessel,—supposing the vessel is in the home port here?

A. We make the purchases for the Master.

Q. Yes, and you assist in that behalf, yourself, do you?

A. Oh, yes.

Q. And if a vessel is under state of repair in the home port, do you, as the local manager, arrange for those repairs?

A. No, we do not.

Q. Who does that?

A. The War Shipping Administration has a department that takes care of that. It is called the M. & R., or Maintenance and Repair Division of the War Shipping Administration. They take care of that.

Q. Your company then supplies the vessel but you do not maintain the vessel, is that correct? As General Agents [fol. 163] you do not maintain the vessels in a state of repair?

A. For our account, or for whose account, sir?

Q. Well, I am trying to get a segregation here between the duties which the Moore-McCormack employees perform and those which, as you claim, the employees of the War Shipping Administration perform.

A. No, it is the duty of the Master and it is the Master's obligation to properly navigate his vessel and properly manage his vessel, keep his vessel in repair, for the account of his principal, which is the War Shipping Administration.

Q. Yes, but as I understand it from reading the contract—and you correct me if I am in error—it is the express obligation of Moore-McCormack Lines to victual, equip, maintain and supply the vessel.

Mr. Wood: Let me see that section. Well, you don't read the whole sentence.

Q. He has it before him. It is subparagraph (c), "subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe."

A. That is correct, and those orders come from the Master.

Q. Now you have shown, if I follow you correctly, that the General Agent, that is, the employees of the Moore-McCormack Lines, arrange for the supplies and deliver them aboard the vessel. That is correct, isn't it?

A. That is correct.

Q. Now, the same paragraph of the agreement says: the Moore-McCormack company shall maintain the vessels, and then you say that the War Shipping Administration has some kind of a service that maintains it in respect to repairs. Now, what, if anything, do you or other officials similarly situated do with regard to the repair of the vessels and the maintenance of the vessels?

A. The maintenance of the vessel while at sea, of course, is taken care of by the Master and the crew. You understand that. When the vessel is in port, the War Shipping Administration takes care of that work. They have their supervisors, surveyors, go aboard and assist the Master in [fol. 164] whatever may be required, in view of the ownership of the vessel being in the name of the United States Government, operated by the War Shipping Administration.

Q. All right, now refer——

Mr. Wood (interrupting): Are you going to be some little time?

Mr. Hicks: I will be some little time.

Mr. Wood: I promised Dr. Smith he could testify at four o'clock.

Mr. Hicks: That is perfectly all right. We have no objection.

Mr. Wood: Then will you step aside, Mr. Tripp? I want to call another witness for a moment.

(Witness withdrawn.)

[fol. 165] K. C. TRIPP, a witness in behalf of defendant, resumed the stand, and further testified as follows:

Cross-examination (continued).

By Mr. Hicks:

Q. Refer to Article 7, will you, Mr. Tripp? (referring to Defendant's Exhibit 21 for Ident.). We discussed the matter of reimbursement of the Moore-McCormack Company under the contract, and I believe you testified that the usual procedure there was for the company to pay out money and keep strict account of it, through accounting methods, and then the Government would reimburse the company for the amounts so expended; is that correct?

A: Yes. We were speaking specifically of the vessel.

Q. Yes.

A. That is right.

Q. Reimbursement there is made "*excepting* general and administrative expense (as presently itemized in General Order)" number so and so. Could you give us just roughly a few of those administrative expenses referred to, in respect to which no reimbursement is made?

A. That I can't do, counsel. I would have to have someone from our accounting department do that, and we don't have anyone here that can give it, and I am not familiar with that at all.

Q. Now, as I understand this language of Article 7, it is provided: "any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder," that as to those matters, in the operation of the agreement the company is reimbursed by the Government; is that correct?

Mr. Wood: No, that is wrong. That comes under the exception.

Mr. Hicks: That is what I was wondering. It is most ambiguous.

Q. Mr. Tripp, in administering this agreement as you are called upon to do, I will ask you whether your company is reimbursed for maintenance, management, operation, or the conduct of the business of the vessel, under clause 7 [fol. 166] of the agreement?

Mr. Wood: I think it is only fair to the witness to say, he has just said, himself, he has nothing to do with the fiscal arrangements. Now, if he doesn't know how to answer, I think he should say so.

Mr. Hicks: I would be glad to accept Mr. Wood's statement, if he knows. I understood him to say a moment ago there was no reimbursement for those features, and if he will say so, I will drop it.

The Court: If you know, you may answer.

A. As far as the company in concerned, I am not familiar with it. I am not qualified to give you an answer on that. I am not familiar with it. I know about the expenses of the vessel because that is something that whenever we have one, we are in daily contact with. But so far as the company's relationship, I am not familiar with that at all. I haven't any experience with that, I am not informed.

Q. I see. Now possibly you are with this clause of the contract to which I am now going to call your attention. I read on down further in Article 7, from which I quote: "To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures * * * including, without limitation, all disbursements for or on account of wages, extra compensation, overtime," and various items, "maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness * * *." Now, you are familiar with the operation of that clause of the agreement, aren't you, Mr. Tripp?

A. Not the interpretation of it, no.

Q. Well, these seamen who are injured come to you for counsel and for administrations in respect to their injuries, don't they, aboard your vessels?

A. Whenever they do in this port, I always have to refer it to our office on the Coast, who is more familiar with it than I am. I have very little of it here.

Q. You refer to your office on the Coast. Tell us who that is.

A. The San Francisco office.

[fol. 167] Q. And who is the man you refer it to?

A. Well, we have two or three in operation of the vessels who are familiar with these matters.

* * * * * * *

Q. Mr. Tripp, I hand you Plaintiff's Exhibit 17 for Identification and ask you to state if that is your signature, and if that is your letter, and whether you wrote that letter.

A. Yes, I did.

Q. Do you remember the circumstances under which you wrote the letter?

A. This was an inquiry by Mr. Hust for certain information from time to time, and this is one of the replies I received from our San Francisco office, which I passed on to Mr. Hust for his information.

Q. And with the letter you made two enclosures, which are attached to and part of Plaintiff's Exhibit 17?

A. That is correct.

Q. And you sent that to him in response to an inquiry that he made of you, representing your company, is that correct?

A. Yes.

Mr. Hicks: Now, if the Court please, we offer in evidence plaintiff's Exhibit 17 for Identification.

* * * * * * *

[fol. 168] Portland, Oregon, Tuesday, May 16, 1944, 9:45 o'clock, A.M.

(The following proceedings were had in chambers, outside the hearing of the jury):

Mr. Wood: Defendant objects to the admission of Plaintiff's Exhibit 17 for Identification for the reason that it is incompetent, irrelevant, and immaterial, and has no bearing on the issues, and particularly because it is full of references to insurance and underwriters, and therefore prejudicial if allowed to go before the jury; and I can't see that it adds anything, your Honor, to the case. If, for example, the purpose of it is to show that this defendant, as an agent, handled claims and settled claims of seamen, we admit that. That is part of the Agent's duties. But otherwise, what purpose there can be in it, I don't know, except the sinister one of insurance and underwriters I mentioned.

* * * * * * *

The Court: I will receive this in evidence.

Mr. Wood: We will take an exception, your Honor.

(Proceedings were thereupon resumed in the courtroom, as follows):

* * * * * * *

Mr. Hicks: Now we renew our offer, your Honor.

The Court: Very well; the Court will receive the exhibit. Exception allowed.

Mr. Wood: Objected to for the reasons already stated in the record, incompetent, irrelevant, immaterial, and decidedly prejudicial.

(Letter from K. C. Tripp, Mgr. Moore-McCormack Lines, to Hust, dated August 24, 1943, with copy of letter from H. W. Dubbin to K. C. Tripp, and copy of letter Aug. 14, 1943 from War Shipping Administration to Moore-McCormack Lines attached, previously marked for identification, was received in evidence marked Plaintiff's Exhibit 17.)

* * * * * * *

[fol. 169] Redirect examination.

By Mr. Wood:

Q. Mr. Tripp, Mr. Dubbin, who has been referred to as the Claims Agent of your Company, who signed those letters of which copies have been introduced, he is the Claims Agent of your company in San Francisco?

A. Yes, sir.

Q. But in handling this claim he was handling it as part of your agent's duties on behalf of the Government, was he not?

Mr. Hicks: We object to that, your Honor, as drawing for a conclusion of the witness. The document itself shows on what basis he handled it.

The Court: Doesn't that call for a conclusion of the witness?

Mr. Wood: I don't think so, your Honor. He knows what the practice is, about how Mr. Dubbin handles the claims.

The Court: No. The Court will sustain the objection.

Mr. Wood: I will reframe the question.

Q. Mr. Tripp, under the service agreement which is in evidence is it the duty of your company to handle claims of this sort on behalf of the War Shipping Administration?

A. Yes, Mr. Wood; all of our activities are of the same nature.

Q. In fact——

Mr. Hicks: (interrupting) Wait a minute. May I interpose an objection? If the company has a duty to do certain things on behalf of the War Shipping Administration, it should be pointed out in the written contract, so that we can know the basis under which the duty arises.

Mr. Wood: Where is that letter? In fact, I would like to show you your own letter, to which the Dubbin letter is attached, and ask you to read to the jury how it is signed, the full signature (handing the letter to counsel).

Mr. Hicks: I read that to the jury.

Mr. Wood: I know you did. I might read it two or three times. How is it signed?

[fol. 170] A. It is signed Moore-McCormack Lines, Inc., Agents for the United States of America, War Shipping Adminstration.

Q. Exactly. By you?

A. By myself, as local Manager.

Q. So that in handling this claim, you were handling it on behalf of the War Shipping Administration?

A. That is correct.

Q. Part of your Agent's duties to do it?

A. That is correct.

* * * * * * *

OFFER OF EXHIBITS

Mr. Wood: I offer in evidence War Shipping Administration Operations Regulation No. 1 and ask to have it marked for identification.

Mr. Green: No objection.

The Court: It will be received in evidence. You state you are offering it in evidence now?

Mr. Wood: Yes, I am offering it now.

(Operations Regulation No. 1 of War Shipping Administration, dated May 25, 1942, was received in evidence, marked Defendant's Exhibit 25.)

Mr. Wood: And I offer in evidence pages 7561 and 7562 of the Federal Register of Friday, September 25, 1942, commencing with the words, "Part 306," near the bottom of the last column on page 7561 and ending with the words "shall be as follows" about two-thirds down the first column on page 7562. I would like to declare that these were obtained from the Library of the Federal Court and must be returned there, and I have had them copied and would like to substitute copies.

Mr. Hicks: We have no objection to that. I would like to see the items.

Mr. Wood: I have marked them (handing the document [fol. 171] to Mr. Hicks). While they are looking at that I will offer the other one. Shall I go ahead and offer the other one?

Mr. Hicks: Yes.

Mr. Wood: I also offer page 6583, the last column, of the Federal Register of Wednesday, August 19th, 1943, Section 306.3, defining General Agents under the agreement here in question. And I would also like to substitute a copy.

The Court: Have you the copy prepared?

Mr. Wood: Yes.

The Court: Have you any objection to that?

Mr. Hicks: I would like to look at it. (Counsel perused the document.) It is all right. It may go in.

The Court: You say it may go in?

Mr. Hicks: Yes; no objection.

The Court: Very well, it will be received, with leave to substitute the copy.

(Copy of Federal Register, September 25, 1942, pages 7561 and 7562, "Part 306—General Agents and Agents," was received in evidence, marked Defendant's Exhibit 26. Copy of Federal Register, August 19, 1942, page 6583, Par. 306.3, "General agents defined," was received in evidence, marked Defendant's Exhibit 27.)

(Discussion between counsel.)

Mr. Wood: And it is stipulated between counsel that in the Federal Register of Friday, September 25, 1942, on page 7562, following the part that I offered in evidence, the whole service Agreement that is in issue here in this case is printed in full, in the Federal Register.

Mr. Hicks: We will so stipulate.

The Court: The record will so show.

[fol. 172] Mr. Wood: I am going to ask Mr. Tripp to take the stand once more. I am going to ask him that question about claims in a different form.

K. C. TRIPP, a witness in behalf of defendant, resumed the stand and further testified as follows:

Redirect examination.

By Mr. Wood:

Q. Mr. Tripp, referring again to this letter and Mr. Dubbin's letter attached to this, I will just ask you this: Under this service agreement has it been always and is it now the practice of the General Agent to handle on behalf of the War Shipping Administration claims of the character involved in this case?

. . . . . .

A. We handle all claims, cargo claims as well as claims of the nature involved in this case, on behalf of the War Shipping Administration. That is our duty.

Mr. Wood: That is all.

Recross-examination.

By Mr. Hicks:

Q. One other question: When you so handle them, those claims which are styled as handled by your company as agents for the War Shipping Administration, you so record on the letters or documents, do you not? I notice your leter was so written, the one received in evidence. Is that right?

A. I don't just get your question.

Q. Stating it another way, Mr. Dubbin is the Claims Agent for the Moore-McCormack Lines, is he not?

A. That is correct.

Q. And the letters you received from Mr. Dubbin with reference to the P. & I. coverage such as mentioned in these [fol. 173] other items, he signs as Claims Agent for the Moore-McCormack Lines, doesn't he; he never mentions Agent for the War Shipping Administration?

A. That is an interoffice communication. We have numerous offices, and the interoffice communication was in the natural transaction of business.

Q. Yes, Mr. Tripp, Mr. Dubbin is in a similar situation as you, is he not, in that you get your instructions from the Moore-McCormack Company, not from the War Shipping Administration, and the same is true of Mr. Dubbin; you get your pay checks from Moore-McCormack, Inc.?

A. I receive my pay check, yes, from Moore-McCormack Lines, Inc. That is correct.

Q. And you have never been employed in any capacity by the War Shipping Administration, have you, Mr. Tripp?

A. Well, I can answer that——

Q. (interrupting) Be very frank about it.

A. I can answer that, yes. One time I was connected with the War Shipping Administration.

Q. But you have not been connected with them since you have been connected with the Moore-McCormack Lines?

A. That is correct, except as agents for them.

Q. Wait a minute. Your company is agent, under your theory, for the War Shipping Administration, but you work for the Moore-McCormack Lines?

A. That is correct.

Q. And if you assist in fulfilling certain contracts which your company has with the War Shipping Administration, you are still working for Moore-McCormack Lines, aren't you?

A. That is correct.

Mr. Hicks: That is all.

Mr. Wood: That is all, Mr. Tripp.

[fol. 174] (Witness excused.)

Mr. Wood: That is defendant's case. Defendant rests.

* * * * * * *

Plaintiff rests.

Testimony closed.

MOTION FOR DIRECTED VERDICT

Mr. Wood: Defendant moves for a directed verdict in its favor on the ground that the evidence conclusively shows that the plaintiff was not employed by the defendant; and

on the further ground that the evidence conclusively shows that no tort or negligence as alleged in the complaint was committed by this defendant, and that the injury is not traceable to any negligence or tort of this defendant.

And in support of the motion, defendant points out that not merely is it not liable because no employer-employee relationship exists and no tort has been shown to have been committed by it, but in addition to that, this case is expressly, by the plaintiff's own allegation, brought under the Jones Act—the complaint so elects—and it is settled law—I don't think Mr. Green will dispute it—that in actions under the Jones Act, the relationship of employer and employee must exist. That condition did not obtain in any of these authorities that have been cited here. They were not brought under the Jones Act.

(Argument by counsel, upon the motion.)

The Court: Gentlemen, my feeling is here that I am going to submit it to the jury. That is the feeling I have in the matter. I think I should do it, under that 1941 amendment to our Code.

Mr. Wood: Then you mean that the Motion for Directed Verdict is now denied?

The Court: Yes, it will be denied.

Mr. Wood: Save an exception.

The Court: You may have an exception.

[fol. 175] • • • • • • •

INSTRUCTIONS TO JURY

• • • • • • •

This action is brought under the terms of an Act of Congress commonly known as the Jones Act, which extends to seamen sustaining injuries in the course of their employment certain privileges in bringing actions for damages. Under this law, the employer of any seaman is liable in damages to any seaman suffering injury in the course of his employment, resulting in whole or in part from the negligence of any of the officers, agents or employees of the employer of such seaman, or by reason of negligent failure to provide seaworthy ships or a safe place in which to work, or to provide safe appliances and equipment, and a breach of this duty constitutes negligence.

• • • • • • •

In determining the issues of this case you will first consider the question of whether the defendant, Moore-McCormack Lines, was the employer of the plaintiff at the time of his injury complained of, and if you find that this relationship of employer and employee existed, you will then determine the remaining issues of the case. If you find that this relationship of employment did not exist, your problems are at an end and you are obliged to find your verdict for the defendant.

On the other hand, if you find that the plaintiff was in the employment of the defendant, he is entitled to a verdict at your hands, providing you find under the instructions that the defendant was negligent in any manner set forth [fol. 176] in the plaintiff's complaint, bearing in mind the standard of requirements as given by the Court, and providing you further find that this negligence, if any, was a proximate cause of the accident and of his injuries. In determining this matter of employment, you are to take into consideration all of the evidence of the case, all of the facts and circumstances.

An employer is one who engages the services of another for hire and who is empowered to control and direct the activities of such individual in the performance of his duties as an employee. An employee is one who engages his services to another for hire and who agrees to perform service under the direction and control of the person hiring him, who is known as the employer. The power of control and direction is one of the principal factors which should be considered by you in determining whether the relationship of employee and employer existed between the plaintiff and the defendant. Stated otherwise, you shall determine by the evidence who had the power to control and direct Cecil I. Hust in the performance of his duties aboard the vessel on the 17th day of March, 1943, and at the time he received his injuries of which he complains in this case.

The defendant in this case, Moore-McCormack Lines, Inc., is a corporation. A corporation can only act through its agents, and it is bound by the acts of its agents when such acts are performed in the scope of their employment or agency, and while acting in the line of their duty as such agents or employees.

The fact that the defendant, Moore-McCormack Lines, Inc., was acting as the General Agent for the United States of America in the conduct of the business of the vessel S. S.

Mark Hanna will not, in and of itself, deprive the plaintiff of a right of recovery for injuries proximately caused by negligence on the part of defendant as alleged by the [fol. 177] plaintiff, if you find that the Moore-McCormack Lines, as a General Agent of the United States, was the employer of the plaintiff. And if you so find, he would be entitled to recover for his injuries proximately caused by its negligence as alleged in his complaint. But if you find that defendant, Moore-McCormack Lines, Inc., was not his employer, he would not be entitled to prevail.

The test to be applied is whether the plaintiff was or was not employed by the defendant. If he was so employed, he has a right to recover for injuries proximately caused by negligence of the defendant as alleged in his complaint. If he was not so employed, he has no right to recover from this defendant.

If you find the relationship of employer and employee to exist between the plaintiff and defendant, you will then consider the remaining issues of this case. In determining the remaining issues, you will first consider the question of responsibility for the accident and the extent of this responsibility under the law as the Court will give it to you.

If you find that plaintiff has failed to establish negligence as alleged, he cannot prevail and your verdict would be for the defendant, for plaintiff may recover only upon proof of negligence as pleaded in his complaint. In this connection I will advise you that proof of all of the specifications of negligence pleaded in plaintiff's complaint is not necessary or required, but the proof by a preponderance of satisfactory evidence of any one of said specifications as pleaded is sufficient to establish negligence.

* * * * * * * *

If you find from a preponderance of satisfactory evidence that defendant was negligent in any one or more of the particulars set forth in plaintiff's complaint and that such negligence, if any, was a proximate cause of the accident, you should find your verdict for the plaintiff, providing [fol. 178] you find he was employed by the defendant, and providing you further find that he sustained injuries as a proximate result thereof.

* * * * * * *

Now, gentlemen of counsel, the Court will advise you that requested instructions not given are refused, and exceptions are allowed.

* * * * * * *

The Court will require in this case that you answer an interrogatory, or question, to be propounded to you, as a part of your findings in this case. This interrogatory reads as follows:

"We, the jury, impaneled and sworn to try the above entitled cause, do answer the Interrogatory submitted to us by the Court as follows:

"Interrogatory: Was the plaintiff, Cecil I. Hust, at the time he sustained his injuries, on the 17th day of March, 1943, an employee of Moore-McCormack Lines, Inc., a corporation?

"Answer: (Yes, or No)."

If you answer this question "Yes," you will then proceed to determine from the facts and the law as the Court has given it to you, if the plaintiff has sustained the necessary proof required, and as to whether or not the plaintiff is entitled to a verdict in this case, and if you so find, you will sign this verdict:

"We, the jury, duly empaneled and sworn to try the above entitled civil action, do find our verdict as follows:

"We find that Cecil I. Hust, the plaintiff herein, was an employee of Moore-McCormack Lines, Inc., a corporation, defendant herein, on the 17th day of March, 1943, and that the said plaintiff sustained injuries in the course of his employment with said defendant company on the said 17th day of March, 1943.

"We do further find our verdict in favor of the plaintiff, [fol. 179] Cecil I. Hust and against the defendant, Moore-McCormack Lines, Inc., a corporation, and assess plaintiff's damages in the sum of blank dollars, inserting the amount you find from the evidence to be the proper amount.

If you answer this question in the negative, the question of employment, answer it NO, you will then sign the following verdict:

"We, the jury, duly impaneled to try this case, find our verdict for the defendant."

If you answer this question in the affirmative, you also have the right to find in favor of the defendant and to sign the defendant's verdict, even though the plaintiff was employed by the defendant,—even though you find he was employed by the defendant, if you find that plaintiff has failed to establish the negligence as alleged in his complaint, and has failed to establish that this negligence was the proximate cause of his injuries and his damages.

The Bailiffs will be sworn.

(Bailiffs were sworn, and the jury retired, for deliberation.)

* * * * * * *

EXCEPTIONS TO THE INSTRUCTIONS

Mr. Wood: Your Honor has already allowed exceptions to the Court's refusal to give instructions requested by the defendant, but I would like to place it in the record, that particularly the instruction that we requested for a directed verdict is based not only on the fact that there was no employer-employee relationship here, but also on the fact that none, neither the Captain nor any of the officers or crew of the ship were agents or servants of this defendant, and therefore, whatever happened aboard the ship, there was absolutely no negligence shown on the part of this defendant. In other words, the evidence fails utterly, I think, to give a scintilla of evidence to support the plaintiff's case.

* * * * * * *

[fol. 180] Then the defendant excepts particularly to submitting the interrogatory to the jury and the more or less special verdict based on the interrogatory because, as your Honor knows, we think the case should not be submitted to the jury at all.

* * * * * * *

The Court: You may have your exceptions. Exceptions allowed.

Exceptions to the instructions.

PLAINTIFF'S REQUESTED INSTRUCTIONS

Instruction No. 6

You are instructed that this is an action brought under what is known as Section 33 of the Merchant Marine Act of 1920, popularly known as the "Jones Act," which is a law passed by the Congress of the United States, extending to seamen injured in the line of their work as seamen the right of trial by jury in all actions against their employers with respect to such injuries, and which said law specifically extends to all injured seamen the benefits of all the laws of the United States, modifying or extending the common law remedy in cases of personal injury to railroad employes. In other words, the Jones Act extends to seamen, injured as the result of negligence of their employers, the right of action for such injuries with the right of jury trial, to the same extent that railroad employes have a right of action against their employers under similar circumstances.

[fol. 181] IN THE SUPREME COURT OF OREGON

[Title omitted]

STIPULATION—Filed October 16, 1945

It is hereby stipulated and agreed by and between the parties to the above entitled case, through their respective attorneys, that in view of difficulties encountered in securing a copy of Plaintiff's Exhibit 15 to be included in the record to be prepared by the Clerk of the above entitled Court that in lieu of a copy of said Exhibit the Clerk may include in said record for transmittal to the Supreme Court

of the United States the original copy of plaintiff's Exhibit 15 consisting of the agreement between the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association and various steamship companies.

Dated this 15 day of October, 1945.

(S.) Thomas H. Tongue III, Of Attorneys for Plaintiff-Respondent. Lofton L. Tatum, Of Attorneys for Defendant-Appellant.

[File endorsement omitted.]

[fol. 182] Clerk's Certificate to transcript omitted in printing.

PLAINTIFF'S EXHIBIT NO. 1 111

VOYAGE No. 1 DATE Oct. 13, 1942

MOORE-McCORMACK LINES, Inc.

CREW PASS AND MUSTER CARD

S. S. CLARK HANNA

NAME Hust, Cecil I.

ART No. _____ RATING Fireman

EMERGENCY STATION Fire room stand by Foamite fire extinguisher

BOAT No. 3

BOAT STATION Attend fwd guy and davit

Initialed J. Moloney

Cecil I. Hust

(Signature of Crew Member)

Keep This Card With You at All Times

PLAINTIFF'S EXHIBIT NO. 2-c

MOORE-McCORMACK LINES, Inc.

NAME C. Hust

FROM 10/9/42 TO 4/15/43	
WAGES	685.67
OVERTIME	
PORT BONUS	
WAR BONUS	
EXPLOSIVE BONUS	
LONG BONUS	
SUBSISTENCE	
BOARD & LODGING	226.80

Keep This Card With You at All Times

PLAINTIFF'S EXHIBIT NO. 2-c

MOORE-McCORMACK LINES, Inc.

NAME C. Hust

FROM 10/9/42 TO 4/15/44	
WAGES	685.67
OVERTIME	
PORT BONUS	
WAR BONUS	
EXPLOSIVE BONUS	
LONG BONUS	
SUBSISTENCE	
BOARD & LODGING	226.80
TOTAL WAGES	912 47
S. S. TAX	9 12
VICTORY TAX	11.13
INSURANCE	
ADVANCES	39 84 100 33
SLOP CHEST	176
ALLOTMENTS	
BOARD & LODGING	226.80
FINES	
TOTAL DEDUCTIONS	560 76
BALANCE DUE	351 71

Nov 15 1943 Pr. Ext. 7 Hawkins, Alvin, Clerk

COUNT MONEY BEFORE LEAVING

183-184

PLAINTIFF'S EXHIBIT NO. 13

TRIPLICATE

Form 705-A
(June 1939)

SHIPPING ARTICLES

(R. S. 4612, as amended—U. S. C., title 46, sec. 713)

DEPARTMENT OF COMMERCE
BUREAU OF MARINE INSPECTION
AND NAVIGATION
SHIPPING SERVICE

Notice is hereby given that section 4519 of the U. S. Revised Statutes (U. S. C., title 46, sec. 577) makes it obligatory on the part of the master of a merchant vessel of the United States, at the commencement of every voyage or engagement, to cause a legible copy of the agreement (forecastle card), omitting signatures, to be placed or posted up in such part of the vessel as to be accessible to the crew, under a penalty not exceeding ONE HUNDRED DOLLARS.

ARTICLES OF AGREEMENT BETWEEN MASTER AND SEAMEN IN THE MERCHANT SERVICE OF THE UNITED STATES

Required by Act of Congress, Title LIII, Revised Statutes of the United States (U. S. C., title 46, chap. 18)

Name of Ship	Official No.	Port of Registry	Date of Register	Registered Tonnage		Voyage No.
				Gross	Net	
MARK HANNA	242366	Portland, Oregon	10-3-42	7176	4874	1

Registered Managing Owner or Manager		Number of Seamen and Apprentices for which Accommodation is Certified	Class of Ship
Name	Address (State number of house, street and town)		
War Shipping Administration (Owner) Moore-McCormack Lines, Inc. (General Agents)	Washington, D. C. 5 Broadway, New York, N. Y.	86	Steam - Freight

Office of the U. S. SHIPPING COMMISSIONER FOR THE PORT OF Portland, Oregon, Oct. 9, , 1942

IT IS AGREED between the Master and seamen, or mariners, of the S. S. "MARK HANNA"

of Portland, Oregon *of which* Henry Hoppner

is at present Master, or whoever shall go for Master, now bound from the Port of [1] Portland, Oregon, *to*

a point in the Pacific Ocean to the westward of Vancouver, Washington, and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any Department, Commission or Agency, thereof on the Pacific [illegible] to be deat[illegible] by the Master [illegible] *and back to a final port of discharge in the United States, for a term of time not exceeding* Twelve (12) *calendar months.*[2]

GOING ON SHORE IN FOREIGN PORTS IS PROHIBITED EXCEPT BY PERMISSION OF THE MASTER

NO DANGEROUS WEAPONS[3] OR GROG ALLOWED, AND NONE TO BE BROUGHT ON BOARD BY THE CREW

SCALE OF PROVISIONS to be allowed and served out to the Crew during the voyage in addition to the daily issue of lime and lemon juice and sugar, or other antiscorbutics in any case required by law

		Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Water	quarts	5	5	5	5	5	5	5
Bread, soft	pounds	1½	1½	1¼	1½	1½	1½	1½
Flour, soft	pounds		1		1		1	
Beef, salt	pounds	½		½		½		
Pork, salt	pounds							
Corned beef	pounds	1		1		1		
Fresh beef	pounds	1½	1½	1½	1¼	1½	1½	1½
Fish, dry, preserved, or fresh	pounds						1	
Potatoes or yams	pounds		1	1	1	1	1	1
Canned tomatoes	pounds	½					½	
Tea	pint			½				
Beans	pint		½		½			½
Rice	pint							

		Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Coffee (green berry)	ounces	XX	XX	XX	XX	XX	XX	XX
Tea	ounces							
Sugar	ounces	3	3	3	3	3	3	3
Molasses	pint	½		½		½		
Dried fruit	ounces	3		3		3		
Pickles	pint		½		½		½	
Vinegar	pint			½				½
Corn meal	ounces	4				4		
Onions	ounces	4				4		4
Lard	ounces	1	1	1	1	1	1	1
Butter	ounces	1	1	1	1	1	1	1
Mustard, pepper, and salt sufficient for seasoning								

GOING ON SHORE IN FOREIGN PORTS IS PROHIBITED EXCEPT BY PERMISSION OF THE MASTER

NO DANGEROUS WEAPONS[5] OR GROG ALLOWED, AND NONE TO BE BROUGHT ON BOARD BY THE CREW

SCALE OF PROVISIONS to be allowed and served out to the Crew during the voyage in addition to the daily issue of lime and lemon juice and sugar, or other antiscorbutics in any case required by law

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Water	quarts	8	8	8	8	8	8
Bread	pound	1/2	1/2	1/2	1/2	1/2	1/2
Flour, cwt.	pounds			1 1/2	1 1/2		1 1/2
Pork, salt	pound	1		1		1	
Peas	pound	1/2		1/2		1/2	
Oatmeal	pound	1		1			
Rice	pounds	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Fish, dried, preserved, or fresh	pound						
Potatoes or yams	pounds	1	1	1	1	1	1
Canned tomatoes	pound	1/2				1/2	
Vinegar	pint		1/2		1/2		
Molasses	pint						1/2

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Coffee (green berry)	ounces	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2	1 1/2
Tea	ounces	1/2	1/2	1/2	1/2	1/2	1/2
Sugar	ounces	3	3	3	3	3	3
Molasses	pint	1/2		1/2		1/2	
Dried fruit	ounces	3		3		3	
Pickles	pint		1/2		1/2		1/2
Vinegar	pint						
Corn meal	ounces	4				4	
Onions	ounces	4				4	4
Lard	ounces	1	1	1	1	1	1
Butter	ounces	1	1	1	1	1	1
Mustard, pepper, and salt sufficient for seasoning							

SUBSTITUTES

One pound of flour daily may be substituted for the daily ration of biscuit or fresh bread; two ounces of desiccated vegetables for one pound of potatoes or yams; six ounces of hominy, oatmeal, or cracked wheat, or two ounces of tapioca, for six ounces of rice; six ounces of canned vegetables for one-half pound of canned tomatoes; one-eighth of an ounce of tea for three-fourths of an ounce of coffee; three-fourths of an ounce of coffee for one-eighth of an ounce of tea; six ounces of canned fruit for three ounces of dried fruit; one-half ounce of lime juice for the daily ration of vinegar; four ounces of oatmeal or cracked wheat for one-half pint of corn meal; two ounces of pickled onions for four ounces of fresh onions.

When the vessel is in port and it is possible to obtain the same, one and one-half pounds of fresh meat shall be substituted for the daily rations of salt and canned meat; one-half pound of green cabbage for one ration of canned tomatoes; one-half pound of fresh fruit for one ration of dried fruit. Fresh fruit and vegetables shall be served while in port if obtainable. The seamen shall have the option of accepting the fare the Master may provide, but the right at any time to demand the foregoing scale of provisions.

The foregoing scale of provisions shall be inserted in every article of agreement, and shall not be reduced by any contract, except as above, and a copy of the same shall be posted in a conspicuous place in the galley and in the forecastle of each vessel.

And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said Master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service to be duly performed the said Master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the foregoing scale. And it is hereby agreed, that any embezzlement or willful or negligent destruction of any part of the vessel's cargo or stores shall be made good to the owner out of the wages of the person guilty of the same. And if any person enters himself as qualified for a duty which he proves himself incompetent to perform, his wages shall be reduced in proportion to his incompetency. And it is also agreed that if any member of the crew considers himself to be aggrieved by any breach of the agreement or otherwise, he shall represent the same to the Master or officer in charge of the ship in a quiet and orderly manner, who shall thereupon take such steps as the case may require.

It is also agreed that [6]

Portland, Oregon
October 9, 1943

It is also agreed that bonus areas, bonus payments, insurance, reimbursements for lost personal effects, wages during internment, and repatriation coverages for all licensed and unlicensed personnel shall be governed by the Maritime War Emergency Board Decisions Nos. 1, 2, 3, 5, 7, & 8, with supplements, amendments, revisions, clarifications, corrections and attachments, and such subsequent decisions as may be applicable to the present voyage.

IN WITNESS WHE

Attested:

Harold M. Gall
Deputy U. S. Shipping Commissioner

Henry Haeffner
Master

c/o Commander 8th Naval District
San Francisco
(Give address)

on the 9th *day of* October, 1943.

The authority of the owner or agent for the allotments mentioned in these articles is in my possession.

Harold M. Gall
Deputy Shipping Commissioner

The Shipping Commissioner or Consular Officer will sign if such authority has been produced and will strike out in ink if it has not

[1] Here the voyage is to be described, and the places named at which the ship is to touch; or, if that cannot be done, the general nature and probable length of the voyage is to be stated, and the port or country at which the voyage is to terminate.

[2] If these words are not necessary they must be stricken out.

[5] Sec. 4608, R. S., prohibits the wearing of sheath knives on shipboard, and the Master informs the crew of this fact.

[6] Here any other stipulations may be inserted to which the parties agree, and which are not contrary to law.

N. B.—This form must not be unstitched. No leaves may be taken out of it, and none added or substituted. Care should be taken at the time of engagement that a sufficiently large form is used. If more men are engaged during the voyage than the number for whom signatures are provided in this form, an additional form should be obtained and used.

Any Erasure, Interlineation, or Alteration in this Agreement will be void, unless attested by a Shipping Commissioner, Consul General, Consul, or Consular Agent, to be made with the consent of the persons interested

PARTICULARS OF ENGAGEMENT

SIGNATURE OF SEAMAN	BIRTHPLACE (If foreign-born, but naturalised, insert NAT. in parenthesis after country of birth)	AGE	HEIGHT Ft.	HEIGHT In.	DESCRIPTION Complexion	DESCRIPTION Hair	NUMBER OF CONTINUOUS DISCHARGE BOOK OR CERTIFICATE OF IDENTIFICATION	SERIAL NUMBER OF LICENSE OR CERTIFICATE	IN WHAT CAPACITY	WAGES Per month	WAGES Rate per hour overtime	PLACE AND DATE OF SIGNING THIS AGREEMENT Place	PLACE AND DATE OF SIGNING THIS AGREEMENT Date	TIME AT WHICH TO BE ON BOARD	MONTHLY ALLOTMENTS Amount	MONTHLY ALLOTMENTS Payable to—
Robin Thames	nat-1930	155	5	8½	S		178-18-9588									
Knut Thorstensen	Norway	43	6	0	Lt.	Br.	0776218	174003	Chief Engr.	$306 80		Portland, Or.	10-8-42	10-9-42	200	Mrs. Clara Thomas (Wife)
Hugh D. McGregor	Mich.	50	5	7½	Lt.	Br.	0755752	169991	1st Asst. Engr.	220 00				10-9-42	130	Mrs. Ruth McGregor Miss Phillis Dorothy J. Cannon (mgr)
James R. Cannon, Jr.	Colo.	24	5	11	R.	Br.	127914	122326	2nd Asst. Engr.	201 25				10-9-42	180	
Francis J. Bristan	Ohio	22	5	11	Fr.	Br.	7-10945	126623	3rd Asst. Engr.	184 00			10-8-42	10-9-42		
Manuel Sandrick	Pa.	40	5	1	Lt.	Br.	7-99205-D1	C-87220	Deck Engr.	117 50			10-9-42	10-9-42	100	[illegible]
Henry W. Hood Jr.	N.C.	24	5	10	Lt.	Br.	3-2[illegible]-D1	C-60251	Oiler	110 00				10-9-42		
Andrew W. Lewis	Wash.	21	5	10½	Dk.	Br.	3-124941	C-54826	Oiler	110 00				10-9-42	100	Mrs. Elena D. Lewis (Wife)
George J. Goldbeck	Ore. ?	46	5	9	R.	Br.	3-293215	C-22824	Oiler	110 00				10-9-42		
Leon K. Munson	Ore.	20	5	6½	Fr.	Br.	3-293220	C-22584	Watertender & Fireman	110 00				10-9-42		
Cecil H. Hiatt	Ark.	35	6	0	R.	Br.	3-23851	YC-11927	Watertender & Fireman	110 00				10-9-42		
Leroy W. Berg	Minn.	37	6	-	Med	Br.	3-184162	C-67074	Watertender & Fireman	110 00				10-9-42	100	Mrs. Emma Pearl Berg (Wife)
Kenneth A. Nelson	Wash.	18	5	11	R	Br.	3-215858	E-399307	Wiper	87 50				10-9-42		
Wallace C. Haas	Wash.	19	5	11	Fr.	Blr.	3-31[illegible]52	E-399303	Wiper	87 50				10-9-42		
Leonard L. Pierce	Calif.	18	5	11	Lt.	Blr.	3-288036	E-270783 B-130983	Engine Cadet	74 75				10-9-42	50	Mr. Frank Lipper (Uncle)
Robert F. O. Bauer	Wash.	20	5	11	Med	Br.	3-213199	E-47919	Engine Cadet	74 75				10-9-42	40	Mrs. O. Bauer (mgr)

Form W-2
U. S. TREASURY DEPARTMENT
Internal Revenue Service

STATEMENT OF INCOME TAX WITHHELD ON WAGES
By Employer
(EMPLOYEE'S RECEIPT)

Calendar Year
1943

$ 16.65

INSTRUCTIONS TO EMPLOYER - Prepare this form in duplicate for each employee from whom a tax has been withheld. Furnish original to employee. Forward duplicate with Return of Income Tax Withheld on Wages, Form W-1, for the fourth quarter of the year (or with the employer's final return, if filed at an earlier date). (See Circular WT.)

INSTRUCTIONS TO EMPLOYEE - This is your receipt for Income Tax (including Victory Tax) withheld. You should keep it for use in preparing your Income and Victory Tax return for 1943, and as evidence of tax withheld.

EMPLOYER BY WHOM PAID (Name and Address of Employer)

Moore-Mc Cormack Lines, Inc.
5 Broadway
NEW YORK 4, NEW YORK

EMPLOYEE TO WHOM PAID	SOCIAL SECURITY NO.	Wages Paid During the Calendar Year 1943	Amount of Income Tax Withheld
D. Cameron	542 12 9952	1461 33	52 59

No. 151.782
Pft. Ext. 76
Alex Clark

DUPLICATE

(Print full name of employee, home address, and Social Security number. If employee is a married woman, name of husband should also be furnished.) (OVER)

193-194

PLAINTIFF'S EXHIBIT NO. 17

BALTIMORE
BOSTON
CHICAGO
DETROIT
LOS ANGELES
NEW YORK
PHILADELPHIA
PITTSBURGH
PORTLAND, ORE.
SAN FRANCISCO
SEATTLE

BELEM (PARA), BRAZIL
BUENOS AIRES, ARGENTINA
MONTEVIDEO, URUGUAY
RECIFE (PERNAMBUCO), BRAZIL

MOORE-McCORMACK LINES, INC.

AGENTS FOR

THE UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION

AMERICAN REPUBLICS LINE • PACIFIC REPUBLICS LINE • AMERICAN SCANTIC LINE

RIO DE JANEIRO, BRAZIL
SANTOS, BRAZIL
SAO PAULO, BRAZIL
SAO SALVADOR (BAHIA), BRAZIL

BERGEN, NORWAY
COPENHAGEN, DENMARK
GDYNIA, POLAND
GOTHENBURG, SWEDEN
HELSINGFORS, FINLAND
MALMO, SWEDEN
OSLO, NORWAY
STOCKHOLM, SWEDEN
WARSAW, POLAND

CABLE ADDRESS: MOOREMACK

Behnke Walker Building

~~BROADWAY-OAK BUILDING~~

1022 S. W. Salmon St., Portland, Ore.

~~OREGON BANK BUILDING, PORTLAND, OREGON~~

August 24, 1943

Mr. Cecil I. Hust
24 South Sixth Street
Forest Grove, Oregon

Re: SS MAUNA KEA

51787
17
Ltr Recd

Dear Mr. Hust:

We enclose letter just received from Lt. Commander W. W. Evans of the War Shipping Administration in New York regarding your claim, together with copy of letter from our San Francisco office.

Will you let us know the amount of your claim so that we may discuss this matter further with our own underwriters.

Very truly yours,

MOORE-McCORMACK LINES, INC.
AGENTS FOR THE UNITED STATES OF
AMERICA, WAR SHIPPING ADMINISTRATION

By

Manager

KCT:M
Encls.2

[fol. 196] Copy

War Shipping Administration, New York City

August 14, 1943.

Moore McCormack Lines, Inc., 200 Pine St., San Francisco, Cal.

Re: SS Mark Hanna, Cecil I. Hust

Your letter of August 10 and previous letters written by you in connection with the above entitled matter have been referred to me for reply.

It appears that the SS Mark Hanna was torpedoed on March 9, 1943, such action resulting in the vessel being in a disabled condition and necessitating a tow. On March 17, while the vessel was being towed to Port of Spain, Trinidad, the tow line parted and the Master ordered all hands out to get up a new tow line from the forepeak. One of the men in the group ordered to do this work was the above mentioned individual, Mr. Hust. Mr. Hust states that he went forward to the forepeak hatch "and went dow below one deck." Mr. Hust further states that there w no lights on the peak nor any guard rails along the hatch way and due to these conditions, he stepped t the open hatch and fell a distance of about twe resulting in rather severe injuries to his back. asked whether this disability is compensable und Shipping Administration Crew Life and Injury

Although, obviously the torpedoing constituted a peril covered by the decisions of the Maritime War Em gency Board, it is my view that the event actually causin injury is so remote that it is impossible to state that injury proximately resulted from the torpedoing. It seem that the actual occurrence causing injury woul resulted despite the reason for which Mr. Hust went be and that although the torpedoing was in a sense the caus of the injury in that Mr. Hust may not have gone below at the particular time for the reason that he did, I do not feel that this is enough to enable me to state that the injury was proximately caused by the torpedoing. It would seem that this event is clearly a marine risk and that, therefore,

it is a matter to be taken up by you with your marine P. & I. underwriters.

I reach this conclusion reluctantly. However, as I have stated, I am of the opinion that this claim is not within the perils clause of the War Shipping Administration Crew Life and Injury Policy and for that reason the same must be rejected.

Very truly yours, Lt. Comdr. W. N. Evans, Acting Assistant General Counsel, by Walter T. Hughes, Jr.

[fol. 197] Moore McCormack Lines, Inc., San Francisco, Cal.

August 23, 1943.

From: H. W. Dubbin, San Francisco.

To: Mr. K. C. Tripp, Portland.

Subject: Cecil I. Hust, FWT., SS Mark Hanna, SF File 608-A

We have received attached copy of letter from the War Shipping Administration regarding Mr. Hust's claim. You will note that they have declined liability for the reason that the injury was not proximately caused by torpedoing and is, therefore, a matter to be referred to our P. & I. Underwriters. This decision is somewhat questionable, nevertheless we will probably have to submit file to the Fulton Underwriting Agency. In presenting Mr. Hust's claim to Fulton, it will be necessary to have the amount he is claiming.

Will you kindly contact the claimant and inform him of the War Shipping Administration's decision, and advise that we are taking the matter up with our own underwriters and request that he submit a claim amount.

H. W. Dubbin.

[fol. 198] DEFENDANT'S EXHIBIT No. 21

Moore-McCormack Lines, Inc. (5 Broadway, New York, N. Y.), Air Mail.

American Republic Line—Copy via Regular Mail—American Scantic Line.

From: Albert F. Chrystal, April 8, 1944.

To: Mr. K. C. Tripp, Portland, Via Air Mail.

Subj.: Your Telegram to "Holt-Smith" Received yesterday.

We attach hereto certified true copies of our G. A. A. Service Agreement (Contract WSA-215) and Letter No. 6 of the War Shipping Administration authorizing and accepting the Mark Hanna for operation under the aforementioned agreement. Kindly return the GAA Contract to the writer when it has served your purpose.

Albert F. Chrystal.

[fol. 199] Copy

War Shipping Administration

Washington

September 14, 1942.

Moore-McCormack Lines, Inc., 5 Broadway, New York, New York.

GENTLEMEN:

The Administrator of the War Shipping Administration has authorized the allocation of the following vessels to your company for the purpose of conducting the business of the vessels for the United States under General Agent Service Agreement (Form GAA), between the United States of America and your company (Contract WSA 215) dated October 19, 1941, subject to all the terms and conditions set forth therein:

Name of Vessel	Date of Allocation	Date of Delivery
Mark Hanna	August 12, 1942	Building
Mormacyork	August 13, 1942	August 19, 1942
Malcolm M. Stewart	September 1, 1942	Building
George Weems	September 8, 1942	Building
Samuel F. B. Morse	September 8, 1942	Building

Kindly indicate your acceptance of the allocation as herein provided of these vessels by executing the acknowledgment on the two carbon copies of this letter that are attached hereto, and return them to his office as promptly as possible.

Very truly yours, (Sgd.) W. C. Peet, Jr., Secretary.

Acknowledged and accepted on behalf of Moore-McCormack Lines, Inc., by (Sgd.) Henry P. Molloy, Vice President. (Corporate seal.)

(Letter No. 6—Certified a true copy. Moore-McCormack Lines, Inc., Albert F. Chrystal, Assistant Secretary.)

[fol. 200] Certified a true copy prepared by and received from the United States of America War Shipping Administration. Moore-McCormack, Albert F. Chrystal, Asst. Secty.

Moore-McCormack Lines, Inc.,

5 Broadway,

Legal Dept.

GAA 4-4-42. Contract WSA-215

Service Agreement for Vessels of Which the War Shipping Administration Is Owner or Owner Pro Hac Vice

This Agreement, made as of October 19, 1941, between the United States of America, (herein called the "United States") acting by and through the Administrator, War Shipping Administration, and Moore-McCormack Lines, Inc., a corporation organized and existing under the laws of Delaware, and having its principal place of business at New York, N. Y., (herein called the "General Agent").

Witnesseth: That in consideration of the reciprocal undertakings and promises of the parties herein expressed:

Article 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time.

Article 2. The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such di-

rections, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to and accepted by the General Agent for that purpose.

Article 3A. To the best of its ability, the General Agent shall for the account of the United States:

(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyages, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices;

(b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United [fol. 201] States may prescribe from time to time, and account to the United States for all moneys collected or disbursed by it or its agents;

(c) Equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe;

(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid

in the customary manner with funds provided by the United States hereunder.

(e) Issue or cause to be issued to shippers customary freight contracts and Bills of Lading. Unless the United States shall otherwise instruct, such Bills of Lading shall contain all exemptions and stipulations usual to the particular trade or service in which the vessels may be engaged, and reserve a lien upon all cargoes for the payment of freight, primage charges, dead freight, demurrage, forwarding charges, advance charges for carriage to port of shipment, for contributions in general average and special charges on cargo and for all fines or penalties which the vessels or cargoes may incur by reason of illegal, incorrect or insufficient marking or addressing of packages or [fol. 202] description of their contents. After a uniform Bill of Lading shall have been adopted by the United States, such Bill of Lading shall be used in all cases as soon as practicable after receipt thereof by the General Agent, with such modifications as shall be necessary for the particular trades in which the vessels hereunder shall from time to time be employed. Pending the issuance of such uniform Bill of Lading, the General Agent may continue to use its usual commercial form of Bill of Lading.

As soon as practicable after April 1, 1942, all Bills of Lading shall be issued by the General Agent or its agents as agent for the Master and the signature clause may provide substantially that the General Agent makes no warranty or representation as to the authority of the United States or the Master to enter into the agreement, and that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof.

Article 3B. The General Agent agrees, without prejudice to its rights under the provisions of Articles 8 and 16 hereof, to:

(a) Perform the duties required to be performed by it hereunder in an economical and efficient manner, and exercise due diligence to protect and safeguard the interests of the United States in all respects and to

avoid loss and damage of every nature to the United States;

(b) Exercise due diligence to see that all Bills of Lading are properly issued, all wharf receipts for freight are non-negotiable, and where required, a freight contract or permit is issued for each shipment;

(c) Furnish and maintain during the period of this Agreement, at its own expense, a bond with sufficient surety, in such amount as the United States shall determine, such bond to be approved by the United States as to both sufficiency of surety or sureties and form, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the General Agent contained in this Agree- [fol. 203] ment, including, without limitation of the foregoing the condition faithfully to account to the United States for all funds collected and disbursed and funds and property received by the General Agent or its agents. The General Agent may, in lieu of furnishing such bond, pledge direct or fully guaranteed obligations of the United States of America of the face value of the penalty of the bond under an agreement satisfactory in form to the United States;

(d) Without the consent of the United States, not sell, assign or transfer, either directly or indirectly or through any reorganization, merger or consolidation, this Agreement or an interest therein, nor make any agreement or arrangement whereby the service to be performed hereunder is to be performed by any other person, whether an agent or otherwise, except as provided in Article 6 hereof.

Article 4. (a) The General Agent and, to the extent required by the United States, every related or affiliated company or holding company of the General Agent, authorized as provided in Article 13 hereof, to render any service or to furnish any stores, supplies, equipment, provisions, materials or facilities which are for the account of the United States under the terms of this Agreement, shall (1) keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by this Agreement in

such form and under such regulations as may be prescribed by the United States; and (2) file, upon notice from the United States, balance sheets, profit and loss statements, and such other statements of operation, special reports, memoranda of any facts and transactions, which, in the opinion of the United States, affect the results in, the performance of, or transactions or operations under this Agreement.

(b) The United States is hereby authorized to examine and audit the books, records and accounts of all persons referred to above in this Article whenever it may deem it necessary or desirable.

[fol. 204] (c) Upon the willful failure or willful refusal of any person described in this Article to comply with the provisions of this Article, the United States may rescind this Agreement.

Article 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine: Provided, That with respect to vessels allocated before February 25, 1942, compensation shall not be less than the amount of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942. Such compensation shall be deemed to cover, but without limitation, the General Agent's administrative and general expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than taxes for which the General Agent is reimbursed under Article 7 hereof), and any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder.

Article 6. The General Agent shall exercise due diligence in the selection of agents. Such agents shall be subject to disapproval by the United States and any agency agreement shall be terminated by the General Agent whenever the United States shall so direct. Any compensation pay-

able by the General Agent to its agents for services rendered in connection with the vessels assigned hereunder shall be subject to approval by the United States. In the event that any of the vessels covered by this Agreement are operated in a service in which an American citizen maintained a berth operation with American flag vessels on September 1, 1939, the General Agent, upon request of the United States, will assign such vessels to such berth operators as agents as may be appropriate under form of agreement prescribed by the United States. Agency fees or equivalent allowances for branch offices in accordance with schedules approved by the United States will be reim [fol. 205] bursable under Article 7 hereof.

Article 7. The United States shall reimburse the General Agent at stated intervals determined by the United States for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder, *excepting* general and administrative expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder) and any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder. The General Agent shall be reimbursed for sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder if the General Agent shall have used due diligence to secure immunity from such taxation. To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures, accruing during the term hereof) in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements, or by action of the Maritime War Emergency Board, any pay-

ments made by the General Agent to a pension fund in accordance with a pension plan in effect on the effective date of this Agreement with respect to the officers and members of the crew of said vessels who are entitled to benefits under such plan, on the effective date of this Agreement, for the amount of any social security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise. The United States may disallow, in whole or in part, as it may deem appropriate, and deny reimbursement for, expenses which [fol. 206] are found to have been made in willful contravention of any outstanding instructions or which were clearly improvident or excessive.

Any moneys advanced to bonded persons by the General Agent for ship disbursements which are lost by reason of a casualty to the Vessel on which the money so advanced is carried shall in the event of such loss be considered an expense of the General Agent, subject to reimbursement as is in the Article 7 provided.

The United States may advance moneys to the General Agent to provide for disbursements hereunder in accordance with such regulations or conditions as the United States may from time to time prescribe.

Article 8. The United States shall, without cost or expense to the General Agent, procure or provide insurance against all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder (which insurance shall include the General Agent and the vessel personnel as assureds) including, but without limitation, marine, war and P. & I. risks, and all other risks or liabilities for breach of statute and for damage caused to other vessels, persons or property, and shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance. The General Agent shall furnish reports and information and comply fully with all instructions that may be issued with regard to all salvage claims, damages, losses or other claims. Neither the United States nor the insurance underwriters shall have any right of subrogation against the General Agent with respect to such risks. The United States may assume any of the foregoing risks ex-

cept those relating to P. & I. risks and collision liabilities. At all times during the period of this Agreement, the United States shall at its own expense provide and pay for insurance with respect to each vessel hereunder against protection and indemnity marine and war risks, and collision liabilities without limit as to liability as to the amount of any claim or the aggregate of any claims thereunder. The United States at its election may write all or any such [fol. 207] insurance, including that against P. & I. and collision liabilities, in its own fund, pursuant to a duly executed policy or policies. Neither the United States nor the insurance underwriters shall have any right of subrogation against the General Agent with respect to any of the foregoing risks. All insurance hereunder shall cover both the United States and the General Agent.

Article 9. In the event of general average involving vessels assigned to the General Agent under this Agreement, the General Agent shall comply fully with all instructions issued by the United States in that connection including instructions as to the appointment of adjuster, obtaining general average security and asserting liens for that purpose unless otherwise instructed, and supplying the adjuster with all disbursements accounts, documents and data required in the adjustment, statement and settlement of the general average. Reasonable compensation for and general average allowances to the General Agent in such cases shall be in accordance with directions, orders or regulations of the United States.

Article 10. Salvage claims for services rendered to vessels other than vessels owned or controlled by the United States shall be handled by, and be under the control of, the United States. Salvage awards for services rendered to other vessels owned or controlled by the United States including the vessels hereunder shall be made by the United States. The General Agent shall furnish the United States with full reports and information on all salvage services rendered.

Article 11. (a) The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent and to assume control forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice.

(b) Upon giving to the United States thirty (30) days' written or telegraphic notice, the General Agent shall have the right to terminate this Agreement, but termination by the General Agent shall not become effective as to any vessel until her arrival and discharge at a continental United States port.

(c) This Agreement may be terminated, modified, or amended at any time by mutual consent.

[fol. 208] Article 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this Agreement, shall be immediately turned over to the United States, at times and places to be fixed by the United States, and the United States may collect directly, or by such agent or agents as it may appoint, all freight moneys or other debts remaining unpaid: Provided, That the General Agent shall, if required by the United States, adjust, settle and liquidate the current business of the vessels. Notwithstanding the foregoing provisions, when the United States shall so direct, the General Agent shall complete the business of voyages commenced prior to the date as of which the Agreement shall be terminated, and, if directed by the United States and subject to any instructions issued by the United States with respect thereto, the General Agent shall continue to book cargo for the vessels for the next voyages after the termination of this Agreement. No such termination of this Agreement shall relieve either party of liability to the other in respect of matters arising prior to the date of such termination or of any obligation hereunder to indemnify the other party in respect of any claim or demand thereafter asserted, arising out of any matter done or omitted prior to the date of such termination.

Article 13. Agreements or arrangements with any interested or related company to render any service or to furnish any stores, supplies, equipment, materials, repairs, or facilities hereunder shall be submitted to the United States for approval as to employment. Unless and until such agreements or arrangements have been approved by the United States, compensation paid to any interested or related company shall be subject to review and readjustment by the United States. In connection with such review and readjustment, the United States may deny reimburse-

ment hereunder of any portion of such compensation which it deems to be in excess of fair and reasonable compensation. The United States may also deny reimbursement, in whole or in part, of compensation under any arrangement or agreement with an interested or related company which it deems to be exorbitant, extortionate or fraudulent. The term "interested company" shall mean any person, firm, [fol. 209] or corporation in which the General Agent, or any related company of the General Agent, or any officer or director of the General Agent, or any employee of the General Agent who is charged with executive or supervisory duties, or any member of the immediate family of any such officer, director or empolyee, or any officer or director of any related company of the General Agent or any member of the immediate family of an officer or director of any related company of the General Agent, owns any substantial pecuniary interest directly or indirectly. The term "related company", used to indicate a relationship with the General Agent for the purposes of this Article only, shall include any person or concern that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the General Agent. The term "control" (including the terms "controlled by" and "under common control with") as used herein means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the General Agent (or related company), whether through ownership of voting securities, by contract, or otherwise.

Article 14. The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and

shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable.

Article 15. The United States shall, when it may legally do so, have the advantage of any existing, or future, con- [fol. 210] tracts of the General Agent for the purchase or rental of materials, fuel, supplies, facilities, services, of equipment, if this may be done without unreasonably interfering with the requirements of other vessels owned or operated by the General Agent.

Article 16. (a) The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands by passengers, troops, gun crews, crew members, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo or personal effects, claims for damages for personal injury or loss of life, and claims for maintenance and cure.

(b) In view of the extraordinary wartime conditions under which vessels will be operated hereunder, the General Agent shall be under no responsibility or liability to the United States for loss or damage to the vessels arising out of any error of judgment or any negligence on the part of any of the General Agent's officers, agents, employees, or otherwise. However, the General Agent may be held liable for loss or damage not covered by insurance or assumed by the United States as required under Article 8 of this Agreement, if such loss or damage is directly and primarily caused by willful misconduct of principal supervisory shoreside personnel or by gross negligence of the General Agent in the procurement of licensed officers or in the selection of principal supervisory shoreside personnel.

(c) In the event that the General Agent shall perform any stevedoring, terminal, ship repair or similar service

for the vessels hereunder at commercial rates, the General Agent shall have all the obligations and responsibilities of the person performing such services under the standard or other approved form of contract with the United States [fol. 211] or, in the absence of such standard or approved form, under usual commercial practice.

(d) The General Agent shall be under no liability to the United States of any kind or nature whatsoever in the event that the General Agent should fail to obtain officers or crews for the operation of the vessels, or fail to arrange for the fitting out, refitting, maintenance or repair of said vessels, or fail to perform any other service hereunder by reason of any labor shortage, dispute or difficulty, or any strike or lockout or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the General Agent whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities.

Article 17. Wherever and whenever herein any right, power, or authority is granted or given to the United States, such right, power, or authority may be exercised in all cases by the War Shipping Administration or such agent or agents as it may appoint or by its nominee, and the act or acts of such agent or agents or nominee, when taken, shall constitute the act of the United States hereunder. In performing its services hereunder, the General Agent may rely upon the instructions and directions of the Administrator, his officers and responsible employees, or upon the instructions and directions of any person or agency authorized by the Administrator. Wherever practicable, the General Agent shall request written confirmation of any oral instructions or directions so given.

Article 18. (a) The General Agent warrants that it has not employed any person to solicit or secure this Agreement upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul this Agreement or in its discretion to deduct from any amount payable hereunder the amount of such commission, percentage, brokerage or contingent fee.

(b) In any act performed under this Agreement, the General Agent and any subcontractor shall not discriminate

against any citizen of the United States on the ground of race, creed, color or national origin.

Article 19: No person elected or appointed a member of [fol. 212] or delegate to Congress or a Resident Commissioner, directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account shall hold or enjoy this Agreement in whole or in part, except as provided in Section 206, Title 18, U. S. C. The General Agent shall not employ any member of Congress, either with or without compensation, as an attorney, agent, officer or director.

Article 20. Subject to the provisions of Article 5 hereof, this Agreement is in substitution of and hereby abrogates and replaces the so-called 1¢ Bareboat Charter Agreements relating to the assignment or allocation to the General Agent of the vessels listed on Exhibit A hereto from the dates stated on such exhibit. Preference Agreements relating to such allocated vessels shall be terminated and abrogated as of the same dates.

All rights and obligations of the parties under said abrogated Bareboat Charter and Preference Agreements are hereby cancelled and this Agreement is made retroactive to the cancellation dates thereof as stated on Exhibit A hereto. However, the General Agent shall be reimbursed for any expenditure made before the earliest permissible cancellation date after March 22, 1942, under said agreements to the extent that such expenditure would have been considered in computing additional charter hire or freight under such agreements. This Agreement, unless sooner terminated, shall extend until six months after the cessation of hostilities.

In Witness Whereof, the Parties hereto have executed this Agreement in triplicate the day and year first above written.

United States of America, by E. S. Land, Administrator, War Shipping Administration, by D. F. Houlihan, for the Administrator; Moore-McCormack Lines, Inc., by Henry P. Molloy, Vice President.

Attest: Albert F. Chrystal, Assistant Secretary.

Approved as to form: W. Radner, General Counsel.

Beach. Cates. (Seal.)

[fol. 213] EXHIBIT "A" TO CONTRACT WSA—215
MOORE-McCORMACK LINES, INC.

Vessel	Date Allocation Approved	Date of Delivery	Cancellation Date of Previous Bare-Boat Charter or Preference Agreement, or both	Date of Redelivery
MOUNT EVANS	10/28/41	10/19/41	10/19/41	
WEST MAXIMUS	12/ 5/41	12/13/41	10/19/41	
CITY OF FLINT	12/18/41	11/24/41	10/19/41	
THUNDERER (ex-AMAZON)	12/30/41	12/27/41	10/19/41	
CHENANGO (ex-KURIKKA)	12/30/41	12/30/41	10/19/41	
ARC LIGHT	12/30/41	12/30/41	10/19/41	
GRANVILLE (ex-WIPUNEN)	12/30/41	12/30/41	10/19/41	
MORMACRIO	1/13/42	1/10/42	10/19/41	
DEER LODGE	1/13/42	1/ 5/42	10/19/41	
MORMACREY	2/11/42	3/ 2/42	10/19/41	
MORMACMAR	2/11/42	1/15/42	10/19/41	
MORMACSUL	2/11/42	2/ 7/42	10/19/41	
COLLAMER	2/11/42	2/17/42	10/19/41	*Sunk 3/5/42
INDEPENDENCE HALL	2/11/42	2/ 4/42	10/19/41	**Stranded 2/4/42
WEST KEENE	2/11/42	To be delivered	10/19/41	

*Approximate date of loss, declared date of loss to be determined by Administrator.
**Reported date of stranding, declared date of loss to be determined by Administrator.

[fol. 214] I, Henry P. Molloy, certify that I am the duly chosen, qualified, and acting Secretary of Moore-McCormack Lines, a party to this Agreement, and, as such, I am the custodian of its official records and the minute books of its governing body; that Henry P. Molloy who signed this Agreement on behalf of said corporation, was then a duly qualified Vice-President of said corporation; that said officer affixed his manual signature to said Agreement in his official capacity as said officer for and on behalf of said corporation by authority and direction of its governing body duly made and taken; that said Agreement is within the scope of the corporate and lawful powers of this corporation.

Henry P. Molloy, Secretary.

(Corporate Seal.)

[fol. 215] DEFENDANT'S EXHIBIT No. 25

War Shipping Administration, Washington

May 25, 1942.

Operations Regulation No. 1

Pertaining to Service Agreement for Vessels of Which the War Shipping Administration Is Owner or Owner Pro Hac Vice

Policy with Respect to Seagoing Personnel

Attached are copies of the following:

Statement of Policy dated Washington May 4, signed by the War Shipping Administration by representatives of the Master-, Mates & Pilots of America, and the National Marine Engineers' Beneficial Association.

Statement of Policy dated Washington May 4, signed by the War Shipping Administration and by representatives of the Sailors Union of the Pacific, Marine Firemen, Oilers, Watertenders & Wipers Association, Seafarers International Union and the Marine Cooks & Stewards Association.

Letter dated May 8 addressed to Mr. Joseph Curren, President of the National Maritime Union of America by Captain Edward Macauley.

Statement of Policy dated Washington May 12, signed by the War Shipping Administration and by the National Maritime Union.

All General Agents are instructed to follow the policy outlined in the attachments with respect to seagoing personnel on vessels owned by or bareboat chartered to the War Shipping Administration and assigned to General Agents under General Agency Agreements.

(Sgd.) M. L. Wilcox, Director of Operations.

[fol. 216] (Masters, Mates & Pilots of America, Marine Engineers' Beneficial Assn., May 4, 1942)

Statement of Policy

I. *Existing Collective Bargaining Agreements to Stand.*

Article 3 (d) of the Service Agreement signed between Agents and the War Shipping Administration under which Agents handle vessels owned by or bareboat chartered to the War Shipping Administration shall remain in force and effect. This article reads as follows:

"(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

The intention of this clause is that in order to make available the full supply of officers and men and to avoid favoritism as to conditions between one agent and another, with respect to preference of employment or use of union hiring halls, all agents will be required to procure officers and men in accordance with such conditions.

[fol. 217] II. *Wages and Working Conditions.*

It is hereby agreed that the provisions of existing collective bargaining agreements be continued and observed unless changed by mutual agreement between the War Shipping Administration and the unions, or in case of a

deadlock by decision of the Maritime War Emergency Board.

III. *Discipline.*

The conditions aboard ship, including common hazard and peril, in war time require the highest standard of order and discipline. To accomplish this purpose, the unions agree to cooperate fully with the War Shipping Administration, as follows:

(1) Maintenance of the authority of the Master and of discipline, including strict and prompt enforcement of laws relating to conduct aboard ship.

(2) Elimination of crews' mass meetings, crews' committees and other similar meetings or groups aboard ship. However, one man in each department will be recognized as the spokesman for that department, but all disputes shall be settled only upon termination of the voyage in a continental port of the United States pursuant to procedures laid down in the collective bargaining agreements.

(3) Without waiving the right to strike, the unions hereby give firm assurance and guarantee that the exercises of this right will be absolutely withheld for the duration of the war.

[fol. 218] IV. *Duration.*

The above provisions shall apply on all vessels of the United States Merchant Marine, owned by or bareboat chartered to The War Shipping Administration as long as the War Shipping Administration has jurisdiction of vessels of the American Merchant Marine.

On behalf of the National Organization of Masters, Mates and Pilots of America, (Sgd.) James J. Delaney. On behalf of the National Marine Engineers' Beneficial Association, (Sgd.) S. J. Hogan. E. S. Land; Edward Macauley, for the War Shipping Administration; William Radner.

Dated May 4, 1942, Washington, D. C.

[fol. 219] (Pacific Coast Seamen, Firemen, and Cooks and Stewards—May 4, 1942.)

Statement of Policy

I. *Existing Collective Bargaining Agreements to Stand.*

Article 3(d) of the Service Agreement signed between Agents and the War Shipping Administration under which Agents handle vessels owned by or bareboat chartered to the War Shipping Administration shall remain in force and effect. This article reads as follows:

> "(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

The intention of this clause is that the General Agent will procure and make available to the Master for engagement by the Master, officers and men through the channels which the Agent has heretofore used for his own merchant ships. If the General Agent has contracts with unions and those contracts require for example preference of employment or use of union hiring halls, the Agent would be required to procure men in accordance with contracts.

[fol. 220] II. *Wages and Working Conditions.*

Inasmuch as base wages, emergency wages, overtime rates, bonuses, war risk compensation, repatriation and allotment conditions have been generally equalized in East Coast, West Coast and Gulf Collective Bargaining Agree-

ments, which agreements have established equitable practices and standards in manning the American Merchant Marine now necessary to furtherance of the war efforts, it is therefore agreed that the existing collective Bargaining Agreements be frozen for the duration of the war.

III. *Discipline.*

The conditions aboard ship, including common hazard and peril, in wartime require the highest standard of order and discipline. To accomplish this purpose, the unions agree to cooperate fully with the War Shipping Administration, as follows:

(1) Maintenance of the authority of the Master and of discipline including strict and prompt enforcement of laws relating to conduct aboard ship.

(2) Elimination of crews' mass meetings, crews' committees and other similar meetings or groups aboard ship. However, one man in each department will be recognized as the spokesman for that department, but all disputes shall be settled only upon termination of the voyage in port where shipping articles are closed.

(3) It is understood that all disputes will be settled through the regular machinery now in existence under [fol. 221] the collective bargaining agreements between the unions and the steamship operators.

(4) Without waiving the right to strike, the unions hereby give firm assurance and guarantee that the exercise of this right will be absolutely withheld for the duration of the war.

IV. *Duration.*

This Statement of Policy will remain in effect as long as the War Shipping Administration has jurisdiction of vessels of the American Merchant Marine.

(Sgd.) E. S. Land; Edward Macauley, for the War Shipping Administration; Harry Lundeberg, Secretary-Treasurer, S. U. P. President, S. I. U.; John Hawk, Secretary-Treasurer, Atlantic & Gulf District, Seafarer's International Union; V. J. Malone, Secretary, Pacific Coast Marine Firemen, Oilers, Watertenders & Wipers Assn.; James W. Burke, Secretary, Marine Cooks & Stewards Assn.

• Dated May 4, 1942, Washington, D. C.

[fol. 222] May 8, 1942.

Mr. Joseph Curran, President, National Maritime Union of America, 346 West 17th Street, New York, New York.

Dear Mr. Curran:

I have your letter of May 7, 1942, asking for clarification of the Statement of Policy on certain points. You know the controversy which has been going on about the Navy taking over the Merchant Marine and about adoption of uniform Rules and Regulations to supplant the existing collective bargaining agreements. It is against this background that the Statement of Policy has been put forth. I want to emphasize that it is a statement of policy and not a set of rules. There are therefore many details which will have to be worked out in the light of the Statement of Policy as we go along. This I am sure we shall be able to do effectively and in a cooperative spirit.

Question No. 1: What guarantee is there in those proposals that the open shop is not frozen and that our right to organize in unorganized steamship companies will not be impaired?

Answer: The subject is not covered by the Statement of Policy; whatever your rights may be in this respect, those rights remain unaffected by the Statement of Policy.

Question No. 2: Does this Statement of Policy propose that the union shall not be able to seek collective bargaining agreements with unorganized steamship companies after they have been organized?

Answer: No.

Question No. 3: In section 3, under Discipline, paragraph 2, does the elimination of crews' mass meetings, crews' committees, and other similar meetings for groups aboard ship, comprehend that there shall be no meetings permitted aboard ship. For example, we have now and are promoting safety meetings aboard ship, and meetings having as their basis the teaching of newly trained seamen in the art of seamanship between their watches?

[fol. 223] Answer: As paragraph (1) in Section 3 under the heading "Discipline" indicates, it is considered sound policy under war conditions that the authority of the Master be strictly maintained. Paragraph 3 contemplates that no meetings be permitted aboard ship "where they tend in any way to interfere with the ship's operation"; and of

this the Master must be the judge. If there may be some Masters who will abuse their discretion in this regard, it is thought better in view of war conditions to remedy abuses ashore rather than to have arguments and disputes aboard ship whether a given meeting interferes with the ship's operation." Should any such abuses develop, the War Shipping Administration will remedy them.

Question No. 4: In the same paragraph, will we be able to have meetings for the purpose of electing the spokesmen. Under our constitution, spokesmen for departments on ships must be elected at ships' meetings.

Answer: Since the Statement of Policy contemplates recognition of a spokesman for each department, ships' meetings may be held for the purpose of electing spokesmen as long as they don't interfere with the ships' operation.

Question No. 5: We are concerned with the fact that there is rumor that such spokesmen are to take the place of union officers. In other words, when the vessel arrives in United States ports, will the practice that is contained in our contracts for union officials to board the vessel to meet with the crew for the purpose of taking up any problems they may have continue, or does this Statement of Policy comprehend the elimination of that policy?

Answer: Section 2 of the Statement of Policy explicitly provides that the provisions of existing collective bargaining agreements be continued and observed. Whatever your contractual rights may be in respect of your officials boarding vessels, those rights remain unaffected.

Question No. 6: It is the feeling of our officers that there is lack of clarity on one or more important question. If the agents that the union now has contracts with were eliminated and new agents established who did not have [fol. 224] previous relationship with the union, would that eliminate our contracts or would the War Shipping Administration, through Section 2, continue our collective bargaining contracts in that event?

Answer: There is no intention and the War Shipping Administration is committed not to "eliminate" the agents who now have contracts with the union. On the other hand, the War Shipping Administration must have full freedom to reallocate vessels from one service to another as the needs of the war effort may require and change agents accordingly, it being the settled policy of the War Shipping Administration to assign vessels in a particular service

to agents who have been operating in that service. The War Shipping Administration will under no circumstances use this freedom of action for the purpose of favoring agents who do not have relationships with the unions, against those who have.

To the extent that this question touches the matter of pools about which you have given me your views in your letter of May 1, 1942, the answer must be subject to whatever comprehensive plan may be formulated in that regard. Such a plan will make provision for the continuation of the unions as a source of supply of officers and men.

Very truly yours, (Sgd.) Edward Macauley, Assistant to the Administrator, War Shipping Administration.

[fol. 225] Statement of Policy

I. *Existing Collective Bargaining Agreements to Stand.*

Article 3 (d) of the Service Agreement signed between Agents and the War Shipping Administration under which Agents handle vessels owned by or bareboat chartered to the War Shipping Administration shall remain in force and effect. This article reads as follows:

"(d) The General Agent shall procure the Master of the vessels operated hereunder subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be

paid in the customary manner with funds provided by the United States hereunder."

The intention of this clause is that in order to make available the full supply of officers and men and to avoid favoritism as to conditions between one agent and another, with respect to preference of employment or use of union hiring halls, all agents will be required to procure officers and men in accordance with such conditions.

[fol. 226] II. *Wages and Working Conditions.*

It is hereby agreed that the provisions of existing collective bargaining agreements be continued and observed for the duration of the war unless changed by mutual agreement between the War Shipping Administration and the unions, or in case of a deadlock by decision of the Maritime War Emergency Board.

III. *Discipline.*

The conditions aboard ship, including common hazard and peril, in war time require the highest standard of order and discipline. To accomplish this purpose, the unions agree to cooperate fully with the War Shipping Administration, as follows:

(1) Maintenance of the authority of the Master and of discipline including strict and prompt enforcement of laws relating to conduct aboard ship.

(2) Elimination of crews' mass meetings, crews' committees and other similar meetings or groups aboard ship where they tend in any way to interfere with the ship's operation. However, one man in each department will be recognized as the spokesman for that department, but all disputes shall be settled only upon termination of the voyage in a continental port of the United States pursuant to procedures laid down in the collective bargaining agreements.

(3) Without waiving the right to strike, the unions hereby give firm assurance and gua-*na*tee that the exer- [fol. 227] cise of this right will be absolutely withheld for the duration of the war.

IV. *Duration.*

The above provisions shall apply on all vessels of the United States Merchant Marine, owned by or bareboat chartered to the War Shipping Administration as long as the War Shipping Administration has jurisdiction of vessels of the American Merchant Marine.

On behalf of the National Maritime Union of America, (Sgd.) Joseph Curran, President; E. S. Land, Edward Macauley, for the War Shipping Administration. William Radner.

Dated May 12, 1942, Washington, D. C.

[fol. 228] DEFENDANT'S EXHIBIT No. 26

Part 306—General Agents and Agents

(General Order No. 21)

Service Agreement Form

Whereas by Executive Order No. 9054, dated February 7, 1942, the President established the War Shipping Administration to assure the most effective utilization of the shipping of the United States for the successful prosecution of the war; and

Whereas the United States of America, acting by and through the Administrator, War Shipping Administration, has appointed certain agents and general agents, and will from time to time appoint additional ones, to conduct the business of vessels assigned to such agents under forms of Service Agreements (TCA-4/4/42 and GAA-4/4/42), approved by the Administrator on April 8, 1942, and

Whereas it is desirable for agents and general agents to appoint berth sub-agents to perform the functions of the agent or general agent under certain circumstances; and

Whereas the Administrator deems it appropriate to issue the following Order concerning the handling of vessels assigned to agents and general agents under service agreements, and the appointment of berth sub-agents by agents and general agents;

Now, Therefore, it is hereby ordered, That:

§ 306.43 *Definitions.* The Terms "agent" (§ 306.4), "general agent" (§ 306.3, page 6583), "berth sub-agent" (§ 306.5 (a)), and "sub-agent" (§ 306.5 (b)) as defined in General Order No. 12, as amended, shall have the same meaning in this order.

§ 306.44 *Service agreements* (GAA-4/4/42). Service agreements entered into between the United States of America, acting by and through the Administrator, War Shipping Administration, with shipping companies appointing them as general agents to manage and conduct the business of vessels (excluding tankers, small craft, salvage and rescue vessels, tugs and barges, and other vessels from time to time excluded with the approval of the Administrator) of which the War Shipping Administration is owner or owner *pro hac vice,* and assigned to the general agents by the United States from time to time, shall be as follows:

[fol. 229] DEFENDANT'S EXHIBIT NO. 27

§ 306.3 *General agents defined.* A general agent is one who takes care of the vessel's business on behalf of the War Shipping Administration, under a standard form of service agreement (GAA-4-4-42), appoints agents as directed by the War Shipping Administration to handle those functions which relate to the handling of the cargo and functions incidental thereto, and assumes those duties when not otherwise instructed, obtains all accounting for all revenue and expenses and accounts to the War Shipping Administration for all business of the vessel.

Federal Register, August 19, 1942, p. 6583.

[fol. 230] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is

hereby, extended to and including October 29th, 1945, provided the time for filing a petition has not already expired.

Wiley Rutledge, Associate Justice of the Supreme Court of the United States.

Dated this 17th day of September, 1945.

[fol. 231] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner, counsel for the respondent having no objection,

It Is Ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including Nov. 28, 1945.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 23rd day of October, 1945.

[fol. 232] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION RE PRINTING OF RECORD—Filed October 29, 1945

For the purpose of Rule 38.8 of the Rules of the Supreme Court of the United States, it is hereby stipulated that the entire record, as filed in this Court, is deemed necessary to be printed for the consideration of a petition for writ of certiorari, except that with reference to exhibits and praecipe only the following portions need be printed:

* * * * * * *

1. Print all of Exhibits 1, 17, 21, 25, 26 and 27.
2. Print only page 1 of Exhibit 16.
3. In lieu of printing the photostatic copy of four envelopes designated as Exhibit 2, 2a, 2b and 2c, print only Exhibit 2c.
4. Exhibit 13.

Print all of page 2, entitled "Shipping Articles," except the provisions and tables between the last line in the second

paragraph reading "exceeding twelve (12) calendar months" and the paragraph beginning with the line "And the said crew agree"—etc., inserting appropriate designations to indicate that a portion of the document has been omitted.

Omit all footnotes on page 2 and the lines following the same, inserting appropriate designation to indicate that a [fol. 233] portion of the document has been omitted.

It is stipulated that following the typed insert signed by Harold M. Ball and Henry Hoeppner and appearing on page 2 of the photostatic copy of said exhibit and in lieu of the portions of said exhibit partially covered by said insert, the following shall be printed:

> "In Witness Whereof the said parties have subscribed their names hereto on the days against their respective signatures mentioned."
>
> (Signed) "Henry Hoeppner, Master of c o Moore-McCormack S. S. Lines, 200 Pine Str., San Francisco."

The column of the names of seamen signing on page 4 of Exhibit 13 shall be printed, (i.e. the page containing the signature of Cecil I. Hust.) but all other columns shall be omitted, with appropriate designations to indicate that such columns have been omitted.

Omit the attached two memoranda from Arthur Joachims to Shipping Commissioner.

Page- 3, 5 and following shall be omitted with designations to indicate that they have been omitted.

5. The praecipe to the Clerk of the Supreme Court of Oregon and attached stipulation for preparation of the record shall be printed, except that the designation of lines and pages of the transcript of testimony to be omitted and listed under item 17 on pages 2, 3, 4, 5 and 6 need not be printed and the word "pleading" under item 6 on page 1 of said praecipe shall be corrected to read "verdict."

[fol. 234] 6. This stipulation shall be printed, but the document filed by petitioner entitled "Sfatement of Points Relied Upon and Designation of Parts of the Record to be Printed" need not be printed.

It is stipulated that in determining the appropriate place in said record in which to print the above designated exhibits and portions thereof the Clerk of the above entitled

Court shall exercise his discretion in accordance with the established custom and practice of said Court, but that in the absence of such custom or practice said exhibits shall be appended at the back of said record rather than inserted in the transcript of testimony at the points where said exhibits were admitted into evidence.

It is further stipulated that although exhibits 14, 15, 18, 19 and 20 are not printed and that although exhibit 13 is not printed in full, all of said exhibits shall remain as parts of said record and that any portions of said exhibits may be referred to by the parties in briefs or in arguments as well as by the Court.

Dated this 26th day of October 1945.

Edwin D. Hicks, Of Attorneys for Petitioner; Erskine Wood, Of Attorneys for Respondent.

[fol. 235] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 4, 1946

The petition herein for a writ of certiorari to the Supreme Court of the State of Oregon is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1945

No. 625

CECIL I. HUST, Petitioner and Plaintiff-Respondent below,

vs.

MOORE-McCORMACK LINES, INC., Respondent and Defendant-Appellant below.

PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT OF PETITION

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ERRATA

Page 7, ll. 10ff	Change to read "as well as the assignments of error (R. 12) and in respondent's requested instruction III and IV, which were by mistake omitted," etc.
Page 28, l. 22	Change to read "the purpose of performing its *duties* under the."
Page 31, ll. 13, 14	Change to read "other provisions listed above *to the* effect that the Agent *shall* be the operator in fact of the ship."
Page 40, l. 25	Change to read "fact as well as *law*."
Page 44, l. 27	Change to read "own act.' (R. 22.) We submit; however *that* it is."
Page 61, l. 6	Change to read "other evidence *on* record," etc.

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1945

No. _____

CECIL I. HUST, Petitioner and
Plaintiff-Respondent below,

vs.

MOORE-McCORMACK LINES, INC.,
Respondent and
Defendant-Appellant below.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Cecil I. Hust, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of the State of Oregon.

STATEMENT OF THE MATTER INVOLVED

This case involves an action by a seaman under the Jones Act (46 U.S.C. 688; 38 Stat. 1185; 41 Stat.

1007) against a steamship company for injuries received due to the negligent operation of a ship operated under a standard General Agency Agreement between the War Shipping Administration and respondent. (Ex. 21; R. 116, 149.)

In October, 1942, petitioner shipped out on the Liberty ship "S.S. MARK HANNA" after signing the shipping articles as required by law for many years. (R. 93, 95; Ex. 13, R. 93, 142-3; 46 U.S.C. sec. 713; 30 Stat. 762, 764; 38 Stat. 1168.) It is undenied that it was also customary for such steamship companies to request the Unions to furnish crew members (R. 100); that there were in effect contracts between the company and various unions (R. 94-5, 101-2); that despite the General Agency Agreement and a so-called "statement of policy" these contracts continued in effect (Ex. 21, R. 116, 149; Ex. 25, R. 130, 164; R. 101-2) and that the company and unions continued to negotiate for the settlement of disputes (R. 103). Petitioner testified that he always understood that he was an employee of the company and had never been informed to the contrary. (R. 110.)

On March 9, 1943, petitioner was ordered to go to the ship's locker in the forepeak for a mooring line (R. 56, 88). He had only once before been in that portion of a similar ship (R. 56, 59, 65, 66). There was no light in the locker room (R. 57, 60, 69, 79, 91), although it was usual to have a light there and although the light globe was replaced immediately after the accident (R. 60, 67, 74, 67, 90). He then fell in the dark through an unguarded hatchway (R. 59, 60, 70), although it was customarily protected by a guard chain which had been removed the day or so before and was replaced by a

guard rope immeditely after the accident. (R. 70, 74, 79, 83-4, 89, 90.)

In defense, respondent company, although admitting that it was the operator of the ship (Answer Par. I, R. 6 and see R. 116), contended that the extent of its operations were limited by the General Agency Agreement (Ex. 21; R. 116, 149) and that under the terms of that agreement it was not the employer of the crew and thus not liable under the Jones Act. (See Answer, R. 6.) Respondent did not attempt to show in what ways, if any, the actual practice of employing crews and operating ships had changed since before the war, when it would clearly have been liable in such a case, but relied principally upon the terms of the General Agency Agreement.

On the question of employer-employee relationship the jury found by special interrogatory that petitioner was an employee of the Company and by its verdict in favor of the petitioner found also that the company was responsible for the negligent operation of the ship. (R. 8, 9). Judgment was entered accordingly. (R. 9.) On appeal by the respondent herein the Supreme Court of the State of Oregon reversed this verdict and judgment, holding that in view of the terms of the General Agency Agreement, Public Law 17 (50 U.S.C. App., sec. 1291; 57 Stat. 45) and the evidence on record the company was, for the purposes of the Jones Act, neither the employer of the crew nor responsible for the negligent operation of the ship. (R. 18, 25, 28, 39.) Judgment was entered by the Supreme Court of the State of Oregon, based on the above-mentioned openion, on April 24, 1945. (R. 38.) On June 29, 1945, the Oregon Supreme Court entered an order denying a petition for rehearing of

its decision in this case. (R. 39.) On September 17, 1945, an order was entered herein by Associate Justice Rutledge extending the time in which to file the within petition for writ of certiorari from September 29, 1945, to October 29, 1945. (R. 174.) On October 23, 1945, a further extension was granted by Associate Justice Douglas to November 28, 1945. (R. 175.)

STATEMENT ON JURISDICTION

1. Statement of Federal Rights Relied Upon.

The grounds upon which it is claimed that a federal question is involved in this case are that your petitioner has from the institution of this case sought to specially claim and enforce a right or privilege under a statute of the United States, within the meaning of Section 237 (b) of the Judicial Code, as amended (28 U.S.C. 344 (b)), and, in addition, that respondent has from the institution of this case sought to specially set up and claim a right, privilege or immunity under a statute of and also under a commission held and/or authority exercised under the United States, within the meaning of said Section 237 (b).

As already stated, this case is an action by a seaman relying upon the rights and privileges provided under the Jones Act (46 U.S.C. 688, 38 Stat. 1185; 41 Stat. 1007) which provides that:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; . . ."

As also stated above, it has been the defense of respondent herein throughout this case that it has a right, privilege or immunity from suit by virtue of the terms of this same statute and also by virtue of its authority and/or commission as a general agent of the War Shipping Administration under the provisions of its General Agency Agreement.

Additional grounds of jurisdiction result from the fact that both petitioner and respondent sought during the course of the proceedings in the courts of the State of Oregon to confirm the existence of the rights, privileges and immunities respectively claimed by them by reference to the provisions of Public Law 17 (50 U.S.C. App. Sec. 1291, 57 Stat. 45) enacted March 24, 1943, only a few days after the injury to petitioner in this case, and the Supreme Court of Oregon in its decision endeavored to interpret and construe the provisions of that federal statute. The principal provision of Public Law 17 in controversy is as follows:

> Section 1 (a) "Officers and members of the crews . . . employed on United States . . . vessels as employees of the United States through the War Shipping Administration shall, with respect to . . . (2) . . . injuries . . . or claims arising therefrom . . . have all of the rights . . . under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels."

2. Federal Question Properly Raised.

The complaint filed by petitioner in the Circuit Court of the State of Oregon for Multnomah County states specifically that this action is brought under the Jones Act. (Complaint, par. VII; R. 5.) This fact was con-

ceded by respondent. (Answer, par. VII; R. 7.) The Oregon Supreme Court also specifically recognized this fact in its decision. (R. 14.)

With reference to Public Law 17, supra, neither the pleadings nor the assignments of error make specific reference to claims of rights or immunity under this statute for the reason that it was not enacted until shortly after the cause of action arose in this case and was thus referred to by the parties solely to confirm the existence of the rights and immunity respectively claimed by them. It was recognized by the Oregon Supreme Court in its decision, however, that petitioner claimed that the provisions of this statute confirmed his right to sue a general agent of the W.S.A. under the Jones Act despite provisions of the General Agency Agreement. (R. 27-33.) Moreover, the Oregon Supreme Court not only undertook to construe and interpret the effect of this federal statute upon the rights claimed by this petitioner under the Jones Act, but undertook to pass specifically upon the question whether the purpose of Public Law 17 "was to grant to agent *immunity* from suit for their own torts." (R. 32.) It is true that the Oregon Court held only that this statute did nothing to change the liability of general agents under the Jones Act (R. 33), but this determination necessarily involved a consideration of whether this statute created, destroyed or confirmed the existence of the rights, privileges or immunities respectively claimed by the petitioner and respondent in this case as well as the question whether the statute was sufficiently unambiguous to satisfy the rule established by this Court in *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 581, to the effect that long established rights of seamen

can only be destroyed by a clear expression of Congressional intent.

The claims by respondent to right, privilege or immunity by virtue of the terms of its General Agency Agreement with the War Shipping Administration, were also not specifically referred to either in the pleadings or in the assignments of error on appeal. We submit, however, that such claims to right, privilege or immunity were implicit in respondent's answer denying that it was the employer of petitioner, as well as in requested instructions and assignments of error to this III and IV, which were by mistake omitted in printing the record, although included in petitioner's praecipe, noting use of terms and language similar to those in Section 3 A (d) of the Agreement; Tr. 268; cf R. 151.) Conclusive proof of reliance upon the terms of the Agency Agreement is shown by the fact that a copy of the agreement was introduced in evidence by respondent. (Ex. 21, R. 116, 149.) The Oregon Supreme Court also makes it clear that the respondent relied specially upon and set up and claimed a right or immunity allegedly granted under the terms of the agreement designating it as a general agent for the War Shipping Administration. (See R. 14.) The court then proceeds to interpret the terms of this agreement and reaches the conclusion that they express an intent by the United States that it shall be the employer of the crew and operator of the ship (R. 18), thereby granting an immunity to the respondent from liability as employer and operator.

The only possible question, from the standpoint of the jurisdiction of this court, is whether respondent's defense based on this Agency Agreement was a claim to

right, privilege or immunity under a law of or under a commission held and/or authority exercised under the United States, within the meaning of Section 237 (b) of the Judicial Code, supra, as discussed below.

3. Authorities Supporting Jurisdiction.

The constant stream of litigation under the Federal Employers' Liability Act and Jones Act frequently makes it necessary for this Court to review on certiorari the decisions of state courts in order to clarify the statutory tests of liability, as well as to explain and apply its own prior decisions. *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, sec. 344. This Court has specifically held that the Jones Act is to have uniform application. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244.

This Court has reviewed cases under these statutes in which the sole question concerned the sufficiency of evidence of liability. *St. Louis I. M. & S. R. Co. v. McWhirter*, 229 U.S. 265, 277; *St. Louis etc. Ry. v. Mills*, 271 U.S. 344, 346; *Atchison, Topeka & Santa Fe Ry. Co. v. Saxon*, 284 U.S. 458; *Chicago Rock Island Ry. v. Wright*, 239 U.S. 548; and *Bailey v. Central Vermont Ry.*, 319 U.S. 350. This is in accordance with the long established and recently reiterated principal that where reference to the facts is necessary to the determination of the precise meaning of a federal right or immunity, as applied, the Court is free to re-examine the facts as well as the law in order to determine for itself whether the asserted right or immunity is to be sustained. *Hooven & Allison Co. v. Evatt*, 324 U.S. No. 4, 652. See also *Cornell Steamboat Company v. Phoenix Constr. Co.*, 233 U.S. 593, and *Norris v. Alabama*, 294 U.S. 587.

Thus the fact that respondent may claim in this case that the decision of the Oregon Supreme Court was based upon a determination of questions of fact whether there was evidence to sustain findings of employer-employee relationship and of negligence does not relieve this court of jurisdiction to determine the right of recovery under the Jones Act claimed by petitioner. It is to be noted, however, that the Oregon Supreme Court not only recognized the existence of the federal questions in thits case (R. 37), but expressly based its decision upon a determination of such questions. (R. 14, 28, 32, 33, 37.) Even its determination of an absence of liability on the part of respondent was based upon its construction of the General Agency Agreement (R. 37), under which respondent claims an immunity, and this alone, as we will next show, is sufficient to raise a federal question.

Basically, all contracts with the United States are to be considered and construed in the light of the federal statutes authorizing and limiting their execution and effect. It has been held by this Court that this principal applies to General Agency Agreements between the War Shipping Administration and private steamship companies. *Brady v. Roosevelt S.S. Co.,* supra. It follows that since the General Agency Agreement in question would directly affect rights of seamen under the Jones Act, the respondent, by claiming a right or immunity under the Agency Agreement is also claiming a right, privilege or immunity under the provisions of the Jones Act itself. It has been recognized that in actions under the Federal Employers' Liability Act, upon which the Jones Act is based, the protection afforded by its provisions is fully as available to employers under claim of federal right or immunity as

are the benefit of its rights available to employees. *St. Louis I. M. & S. R. Co. v. McWhirter,* supra, at 275; *Atchison T. & S. F. R. Co. v. Saxon,* supra, at 459. See also *St. Louis etc Ry. v. Mills,* supra.

Moreover, the contract in question is one under which respondent assumes to act as a general agent for the War Shipping Administration. It follows that in acting as such an agent the respondent was undertaking to act under a commission held and/or authority exercised under the United States, and that in claiming immunity under the terms of the Agency Agreement it is claiming immunity under the terms of such commission or authority. This Court has specifically held that the claim to a right, privilege or immunity by virtue of a contract between the United States and a private corporation may properly be considered as a federal question within the meaning of the Judicial Code. *United States v. Ansonia Brass etc. Co.,* 218 U.S. 452, 462-3. Other cases sustaining the jurisdiction of this Court over rights, privileges or immunities claimed under contracts with the government include the following: *Yearsley v. W. A. Ross Const. Co.,* 309 U.S. 18; *United States v. Pink,* 315 U.S. 203, 217, and *Carpenter v. Shaw,* 280 U.S. 363. See also *United States v. Allegheny County,* 322 U.S. 174, 183, holding that:

> "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create of permit, all present questions of federal law not controlled by the law of any state."

4. Federal Question Is Substantial.

We submit that this case is not only one "where a state court has decided a federal question of substance not theretofore determined by this Court," but is also one where a state court has decided such a question "in a way probably not in accord with applicable decisions by this Court." (Sup. Ct. Rule 38, par. 5 (a).)

This is clearly a case of first impression. This Court has never decided whether a seaman injured due to negligence in the operation of a ship subject to a General Agency Agreement of the standard form involved in this case may bring suit under the Jones Act and in the State Courts against the steamship company involved. As noted below, several other cases involving the same issue have been decided by state and federal trial and lower courts but the question has not yet been directly decided by any Circuit Court of Appeals nor by any other state court of last resort. As stated by the Oregon Supreme Court with commendable frankness:

> ". . . it is apparent that there is no decided weight of authority on this important question, which must ultimately be determined by the Supreme Court of the United States." (R. 37.)

It appears from the following cases that with the inclusion of cases not considered by the Oregon Supreme Court, the majority of decisions supports the position of the petitioner and is opposed to the decision appealed from in this case: *McCormick v. Moore-McCormack Lines, Inc.*, 54 F. Supp. 399; *Gay v. Pope & Talbot, Inc.*, 47 N.Y.S. (2d) 16; *Schaller v. Matson Navigation Co.*, 43 N.Y.S. (2d) 566; 1943 A.M.C. 839; *Moss v. Alaska Packers Assoc.* (Cal. Appel. Ct.) 1945 AMC Vol. 4, 493; *Bast v. American Hawaiian Steamship Co.* (E.D.

Pa.), 1945 AMC, Vol. 4, 503. See also: *Carroll v. United States,* 133 F. (2d) 690 at 693; *Lewis v. U. S. Navigation Co.,* 57 F. Supp. 652. Cases relied on by respondent include: *Murray v. American Export Lines, Inc.,* 53 F.S. 861; *Neilsen v. American President Lines, Ltd.;* 1944 A.M.C. No. 8, 1169; *Conlon v. Hammond Shipping Co., Ltd.,* 55 F.S. 635; *Baker v. Moore McCormack Lines, Inc.,* 57 F.S. 207.

On December 18, 1942, this Court decided the case of *Brady v. Roosevelt S.S. Co.,* supra, which involved a suit in admiralty for the death of a customs inspector against a steamship company under Agency Agreement with the U. S. Maritime Commission, which owned the ship. The Circuit Court of Appeals had held that under the Suits in Admiralty Act there was no remedy against the Company and that the exclusive remedy was against the government. (128 F. (2d) 169.) This Court accepted petition for certiorari and held that neither the Suits in Admiralty Act nor provisions of the agreement between the company and the Commission removed the liability of the company in that case.

Since the *Brady* case certain changes have been made in the General Agency Agreements between steamship companies and the government. In addition, Public Law 17, supra, has been enacted. The majority cases cited above supporting petitioner's view that such actions may still be brought under the Jones Act take the position that the principles of the *Brady* decision are still controlling, unaffected by these changes. Yet the Oregon Supreme Court expressly held that the *Brady* case was not controlling over this question. R. 25-27.) We submit, however, that the decision in the *Brady* case, together with decisions by lower courts on

this question, show upon their face that there are substantial reasons for believing that the Oregon Supreme Court decided this case in a way probably not in accord with applicable decisions by this Court and that this case involves a federal question requiring analysis of federal statutes and of decisions of this Court and exposition of the same before a proper decision can be reached. *Robertson and Kirkham,* supra, at p. 97; *Milheim v. Moffat Tunnel Improvement District,* 262 U.S. 710, 716-7.

The question involved in this case is also one of great public importance. If the decision of the Oregon Supreme Court is correct thousands of American seamen will be deprived of their rights to bring suits in state courts under the Jones Act, with the guaranty of trial by jury, against the large proportion of steamship companies now operating under Standard Agency Agreements. Even if the only federal right claimed by this petitioner under the Jones Act were the right to jury trial in a state court, we submit that the loss of this right alone raises a federal question of substantial importance since it has been recognized by this Court that the right to jury trial is "part and parcel" of the remedy afforded under the Jones Act and that to deprive workers of the benefit of a jury trial is to take away "a goodly portion of the relief which Congress has afforded them." *Bailey v. Central Vermont Ry.,* supra. See also *Tennant v. Peoria & R. P. Ry. Co.,* 321 U.S. 29, 35. We also submit that there are important reasons of public policy at this time in view of the number of war contracts entered into by the federal government with private corporations and the extreme importance of many of the questions now arising under such contracts to support the position that this Court should

exercise its discretion to review by writ of certiorari the decision of any state supreme court which undertakes to pass upon the validity of any right or immunity claimed by a private corporation by virtue of the provisions of a contract with the federal government, particularly where the contract designated the company to be an agent of the government and is a standard form governing the rights of thousands of seamen engaged on hundreds of ships.

THE QUESTION PRESENTED

The ultimate and primary question presented to the Court in this case is whether this petitioner, a seaman employed on a ship operated under the standard form of General Agency Agreement effective April 4, 1942, between the War Shipping Administration and various steamship companies, has a cause of action which he may pursue in a state court under the Jones Act against such a company as the operator of the ship and as his employer for injuries received due to the negligent operation of the ship.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

In addition to the foregoing statement supporting the jurisdiction of this Court petitioner submits the following additional reasons why the Supreme Court of the State of Oregon erred in its decision and decided a federal question of substance not theretofore determined by this Court in a way probably not in accord with applicable decisions by this Court:

(1) The Supreme Court of the State of Oregon in its decision failed to follow the principle of law estab-

lished by this Court that the liability of an agent of the Federal government to a third party cannot be removed by contract.

In the *Brady* case, supra, this Court established the principles that contracts with the government must be construed in the light of the legislation enacted by Congress authorizing their execution and that the liability of a steamship company to a seaman as a general agent of the government cannot be removed by contract between the company and the government. The only distinctions between that case and the instant case are that it was an action under the Suits in Admiralty Act while this is an action under the Jones Act and that certain changes have been made in the provisions of the standard form of General Agency Agreement since the decision in that case.

The fact that the two cases arose under different statutes is a distinction without a difference for the reason that both statutes require proof of liability and mere contract provisions alone cannot absolve an agent from responsibility as an employer under the Jones Act any more than from liability for his own negligence. For the same reasons, the mere fact that certain changes had been made in the form of agreement does not relieve the agent from liability.

(2) Even assuming that it was competent for the respondent and the government to absolve the Company from such liability by virtue of the General Agency Agreement, the Oregon Supreme Court failed to properly construe and apply terms of that agreement making it clear that for the purposes of the Jones Act the Company continued to be the operator of the ship and employer of the crew.

The Agency Agreement contains specific references to the "operation" of the vessels by the general agent and makes even clearer an intent that the steamship company was to be the operator of the ship by provisions that the agent was to "manage and conduct the business of the vessels assigned to it," to "maintain" them in an efficient state of repair, to be reimbursed by the government for "claims," including personal injuries, "connected with the operation or use of said vessels," and that the ships in the "custody" of the agent were to be "turned over" to the government at the termination of the agreement. It does not purport to provide that operations, even while at sea, shall be conducted other than by the agent itself, nor does it qualify the duty of inspection and maintenance imposed on the general agent or limit that duty to times when the vessels are in port.

Although the contract, while specifying that the master shall be procured by the Company, provides also that he is to be an employee of the United States, it contains no such provision with reference to the crew, but provides only that the Agent shall "procure the crew." Although the crew is then to be referred to the Master for "engagement" this provision does not prevent him from doing so as agent for the company nor substantially alter practice previous to the revised form of agency agreement. Later provisions referring specifically to "employment" by the Agent and requiring only approval by the United States make clear that such was the intent of the term "procure." The intent that the Agent be responsible as employer of the crew is made clearer by other provisions such as that the Agent be reimbursed for wages paid as well as compensation for personal injuries.

(3) The Oregon Supreme Court also failed to properly consider other evidence in the record sufficient to sustain the findings by the jury that for the purposes of the Jones Act respondent was the employer of the petitioner, operator of the ship and liable for its negligent operation.

Evidence outside the Agency Agreement sustaining the jury findings that the respondent steamship company was the employer of seaman Hust includes pay envelopes, crew pass and muster cards all bearing the company name, tax withholding slips printed by the Company and designating it as employer, correspondence indicating that both the Company and the W.S.A. had interpreted the contract to impose liability upon the company for the claim in question, and union agreements executed prior to the Agency Agreement, designating the company as the employer of the crew, and continued in effect or "frozen" for the duration of the war.

(4) In addition, the Oregon Supreme Court failed to properly construe and apply provisions of Public Law 17, supra, confirming the intent that under standard General Agency Agreements the steamship companies were to be responsible for the purposes of the Jones Act as the employers of the crews and the operators of the ships, and were to be liable for injuries resulting from their negligent operation.

Public Law 17 and the House Report on its provisions specify that the ships under General Agency Agreements were to be operated by private steamship companies, which were to procure their crews through their customary channels, that the crews were to be only "technically" government employees, and that they

were to retain all of their rights under the Jones Act and were to have their rights determined as though in private employment, in accordance with their stated preference, to be enforced either in federal or state courts.

(5) The Oregon Supreme Court failed to recognize that companies engaged in the operation of vessels under General Agency Agreements are owners "pro hac vice" and thus liable under the Jones Act to seamen employed on such ships for injuries due to their negligent operation, regardless of whether such seamen may technically be their employees.

Argument in support of these points is included in the attached brief.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Supreme Court of the State of Oregon commanding said Court to certify to this Court a complete transcript of the record and of all proceedings of said Supreme Court of the State of Oregon had in said cause, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; that the judgment of the Supreme Court of the State of Oregon be reversed, and for such further relief as to this Court may seem proper.

Dated November 23, 1945.

B. A. GREEN
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Of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1945

CECIL I. HUST, Petitioner and Plaintiff-Respondent below,

vs.

MOORE-McCORMACK LINES, Inc., Respondent and Defendant-Appellant below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURT BELOW

The opinion of the Supreme Court of the State of Oregon was filed on April 25, 1945, and is reported in 40 Or. Adv. Sh. No. 13, p. 493, 158 P. (2d) 275. (See also R. 13ff.)

JURISDICTION

In order to conserve the time of the Court petitioner adopts the statements of jurisdiction included in the preceding petition (pp. 4 to 14) as a part of this brief and will not repeat or elaborate upon said statement except to submit further argument below to support the conclusion that the Oregon Supreme Court erred in that it decided a federal question of substance not theretofore determined by this Court in a way prob-

ably not in accord with applicable decisions by this Court. (Sup. Ct. Rule 38, par. 5 (a).)

STATEMENT OF THE CASE

The statement included in the preceding petition (pp. 1 to 4) is hereby adopted and made a part of this brief for the purposes of brevity.

SPECIFICATION OF ERRORS

(1) The Supreme Court of the State of Oregon in its decision failed to follow the principle of law established by this Court in the case of *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, that the liability of an agent of the government to a third party cannot be removed by contract.

(2) Even assuming that it was competent for respondent and the government to absolve the company from such liability by virtue of a General Agency Agreement the Oregon Supreme Court failed to properly construe and apply terms of that agreement making it clear that for the purposes of the Jones Act (40 U.S.C. 688; 38 Stat. 1185; 41 Stat. 1007) the company continued to be the operator of the ship and employer of the crew.

(3) The Oregon Supreme Court also failed to properly consider other evidence sufficient to sustain the findings by the jury that for the purposes of the Jones Act, supra, respondent was the employer of the petitioner, operator of the ship and liable for its negligent operation.

(4) The Oregon Supreme Court failed to properly construe and apply provisions of Public Law 17 (50

U.S.C. App. Sec. 1291; 57 Stat. 45) confirming the intent that under standard General Agency Agreements the steamship companies were to be responsible for the purposes of the Jones Act as the employers of the crews and operators of the ships, and were to be liable for injuries resulting from their negligent operation.

(5) The Oregon Supreme Court failed to recognize that companies engaged in the operation of vessels under General Agency Agreements are owners "pro hac vice" and thus liable under the Jones Act to seamen employed on such ships for injuries due to their negligent operation, regardless of whether such seamen may technically be employees of the government.

ARGUMENT

Summary of Argument

As a summary of the argument under each of the above specifications of error petitioner would refer the Court to the statement of "Reasons Relied Upon for Allowance of Writ," included in the preceding petition (pp. 14 to 18) and adopts the same as a part of this brief.

Point I. The Supreme Court of the State of Oregon Failed to Follow the Principle of Law Established by This Court That the Liability of an Agent of the Government to a Third Party Cannot Be Removed by Contract.

This court in the case of *Brady v. Roosevelt Steamship Co.*, supra, recognized two basic principles of law: (1) That contracts with the government must be construed in the light of the legislation enacted by Congress

authorizing their execution, with the result that substantial changes in the rights and duties of government agents to third parties will not presumed in the absence of an expression by Congress in unambiguous terms, and, (2) that the liability to a seaman of a steamship company operating as a general agent of the government cannot be removed by changes in the provisions of the contract between the company and the government.

Obviously, the War Shipping Administration, in devising and entering into the standard form of General Agency Agreement with the various steamship companies, including respondent, could not exceed the powers conferred by the government upon that agency. Under Executive Order 9054, 7 F.R. 837 and 7327 (50 U.S.C.A. Appendix, p. 547), establishing the War Shipping Administration it was made clear in section 2(a) that the War Shipping Administration should do no more than to "control the operation—and use" of all merchant ships under the flag or control of the United States, while in Section 3 it was provided that the W.S.A. should exercise the same powers and duties with respect to the *operation* of ships as previously conferred upon the U. S. Maritime Commission under the Merchant Marine Act of 1936 (46 U.S.C. Chapter 27, sec. 1101ff; 49 Stat. 1985). (See also Sections 2 (i) and (k) of the Executive Order.) Although Section 9 authorizes the employment of necessary personnel for the W.S.A. itself, it is obvious that this provision does not authorize the employment of crews by the W.S.A. as its employees for the ships whose operations it was to control and petitioner has found no appropriation by Congress for the payment by the W.S.A. of wages to crews, as employees of the W.S.A. On the contrary, as made clear

by Article 7 of the contract itself (Ex. 21, R. 155) the W.S.A. was only to reimburse the general agent for payment as an expense of operation of wages of the crew, which under Article 3 A (d) was to be procured by the agent.

The Merchant Marine Act of 1936, which was the statute authorizing the contract involved in the *Brady* case and which by reference in Executive Order 9054 is also the controlling statute over the contract in this case, also contains provisions making clear an intent by Congress that the government, through the Commission, although permitted to acquire and own vessels, should, insofar as possible, enter into contracts providing for the operation of such vessels by private steamship companies. See Sections 1101 (c), 1120 (2), 1171 (a) (3), 1194, 1195, 1203, 1211 and 1225. Likewise, this Act makes no provision for employment by the Commission of crews for the ships under its control, but only for employment of personnel to discharge its administrative functions. Section 1111 (e) makes this intent particularly clear. On the other hand, Section 1131 (2) and 1132 (e) make it clear that although the Commission was to control wages and working conditions for the crews on ships operated under contract with it, they were to be employed by the contracting steamship companies engaged in the operation of such ships. It was also provided by Section 1128 (f) that the rights of seamen under existing law were not impaired by its provisions.

Petitioner has not discovered and respondent has not claimed that there were any changes, since the date of the trial and decision in the *Brady* case, either by statute or executive order, in the legal authority under

which the General Agency Agreement in this case was executed and which would affect the outcome of this case. We thus submit not only that the basis of the liability of a steamship company engaged as a general agent of the government remained the same, but also that there was no authority for the W.S.A. to enter into a contract which, as interpreted by the respondent, would provide that the W.S.A. itself should be the employer of the crews for the ships subject to the contract, thereby divesting the steamship companies from any liability to members of the crews of ships assigned to them for operation.

There is also no evidence in the record of this case of any substantial changes since the *Brady* case either in the general practices for the operations of ships under General Agency Agreements with the government or in the practices relating to the employment of their crews which would affect the outcome of this case. On the contrary, the practice for crews to sign the shipping articles in the presence of the U. S. Shipping Commissioner and the Master of the ship had existed by statute since 1898; 46 U.S.C. sec. 713; 30 Stat. 762, 764; 38 Stat. 1168. See also Ex. 13; R. 142). Section 3A (d) of the contract specifically provided that the crews were to be procured "through the usual channels and in accordance with customary practices." (Ex. 21, R. 151.) In addition, as shown below (pp. 40 to 43) there were union agreements in effect between the steamship companies and unions, the term of which had been continued and "frozen" for the duration of the war.

Thus, the only distinctions between the *Brady* case and the instant case are: (1) That it was an action

under the Suits in Admiralty Act, while this is an action under the Jones Act, and (2) That certain changes have been made in the provisions of the general agency agreements since the decision in the *Brady* case.

The mere fact that the two cases arose under different statutes is clearly a distinction without a difference so far as the question involved in this case is concerned for the reason that the primary question in both cases was one of liability for personal injuries and whether the provisions of the General Agency Agreements provided immunity from such liability. Both statutes impose liability on ship operators for their negligent acts and mere contract provisions alone cannot absolve an agent from responsibility as an employer under the Jones Act any more than from liability for negligence where no question of the employer-employee relationship is involved. For the same reasons, the mere fact that certain changes had been made in the form of the agreement does not of itself operate to relieve the agent from liability to a third person either as an employer of a seaman or as one otherwise responsible for the negligent operation of a ship.

One of the most significant points of this case, however, is that the Oregon Supreme Court in deciding both the question of the employer-employee relationship and that of responsibility for the negligent operation of the ship relied primarily upon the provisions of the contract between respondent and the W.S.A. and, as will be noted below (pp. 34, 35), in a large measure upon the language of one section, namely section 3A(d). We think it fair to state from an analysis of this decision that in the absence of that one section and the presence of a provision such as in the *Brady* case, in which the

agent agreed to man the ship and was more clearly in charge of its operations (R. 20; and Footnote 1 of the *Brady* case supra), that the company was liable both as employer of the crew and as responsible for the negligent operation of the ship. Thus, we submit, the Oregon Supreme Court failed to accept and properly apply the principle established by this Court in the *Brady* case that the liability of an agent of the government to a third party cannot be removed simply by changes made in the Agency Agreement.

On the other hand, the majority of courts which have thus far passed upon this problem have regarded the principles established in the *Brady* case as absolutely binding and controlling and as requiring a decision that general agents under such agreements continue to be under liability to the crews of such ships both as their employers and as responsible for the negligent operation of the ships. See *Gay v. Pope & Talbot, Inc.*, 47 N.Y.S. (2d) 16; *McCormick v. Moore-McCormack Lines, Inc.* (E.D.Pa.), 54 F.S. 399; *Moss v. Alaska Packers Assn.* (Cal. App.) 1945 A.M.C., Vol. 4, 493; *Bast v. American Hawaiian S.S. Co.* (E.D.Pa.), 1945 A.M.C., Vol. 4, 503; and *Schaller v. Matson Navigation Co.*, 43 N.Y.S. (2d) 16; 1943 A.M.C. 839. The principal case relied on by respondent, that of *Murray v. American Export Lines, Inc.* (S.D.N.Y.), 53 F.S. 861, is clearly not controlling for the reason that, as pointed out in the *Gay* case, supra, the plaintiff there conceded that the only negligence was that of a fellow servant and that both he and the plaintiff were employed by the United States.

We thus submit that the language of this Court in the *Brady* case must be taken to mean, in accordance with what it says, that an agent, such as the respondent,

and a government commission, such as the W.S.A., may not enter into a contract between themselves which would operate to deprive seamen of the rights for which they struggled so many years and in respect to which their efforts were finally rewarded by enactment of the Jones Act. The rights of seamen thus acquired are basic and it would seem strange indeed if Congress should authorize one of its governmental commissions to contract away these rights without some statutory enactment expressly authorizing such action.

Point II. Even Assuming That It Was Competent for Respondent and the Government to Absolve the Company from Liability by Virtue of a General Agreement the Oregon Supreme Court in Its Decision Failed to Properly Construe and Apply Terms of That Agreement Making It Clear That for the Purpose of the Jones Act the Company Continued to Be Responsible as the Operator of the Ship and Employer of the Crew.

Before discussing the particular provisions of the General Agency Agreement (Ex. 21, R. 116, 149) we submit that this Court should bear in mind a few of the salient facts composing the background of that agreement. By Executive Order No. 9054, dated February 7th, 1942, the President of the United States established the War Shipping Administration to assure the most effective utilization of the shipping facilities of the United States for successful prosecution of the war. Thereafter the War Shipping Administration requisitioned and/or otherwise acquired jurisdiction of hundreds of cargo vessels. The appellant company, as one of the larger of the shipping companies, then received allocation of numerous cargo vessels, including the "MARK HANNA." (Def. Ex. 21, R. 116, 149.) The

appellant company had for many years prior to the advent of the war been engaged in the operation of ships carrying freight between ports of the United States and other ports throughout the world. (R. 6.) It had an operating organization, highly experienced in all phases of the shipping industry and maintained offices and operating personnel in all major ports of the world. (Ptf. Ex. 17, R. 129, 145.) The War Shipping Administration, on the other hand, had had no experience in the operation of ships; it had no organization or personnel suited to such purpose, as is apparent from the provisions of this executive order as well as of the Merchant Marine Act of 1936, both of which are referred to above.

A. Contract Provisions Establishing Respondent as Operator of the Ship.

Perhaps the most important single issue in this case is whether respondent company was the operator of the ship. If respondent was in fact the operator of the ship, it follows that it had control over the crew so as to constitute it as employer of the crew, at least for the purpose of performing its charter under the agreement, and, in addition, that it was responsible for the condition of the ship throughout the voyage, including the facts causing plaintiff's injury. It is obvious that the actual operation of a ship can only be performed for the operator by its crew.

Article 1 states that the General Agent shall "manage and conduct the business of the vessels assigned to it," making it clear that, although acting as agent, the physical possession of the ships is turned over to the steamship company and they are physically operated by it. (R. 150.)

Article 2 is to the same effect. It speaks also of the assignment of vessels to the Agent and its acceptance of such vessels, making further clear an intent to transfer physical possession of the ships. While stating that the Agent shall act in accordance with regulations issued by the government, such regulations would only be pertinent to this case if they were to the effect of stripping the Agent of power of operation of vessels during their voyages. (R. 150-1.) As we shall see, there were no contract provisions to that effect and, as we have already seen, all statutes and regulations were to the contrary effect, namely, that the Agent was to be the operator in fact of the ships.

Article 3A (a) imposes on the Agent the duty of maintaining the vessel, subject to orders as to voyages, cargoes, rates and all matters connected with the use of the vessels or in the absence of orders to follow reasonable commercial practice. (R. 151.) This makes it even clearer that the Agent is to be the actual operator of the ship, subject only to orders from the government and that it was to exercise its discretion in the absence of such orders. Reference to "voyages" and to "use of the vessels" could have no meaning aside from operations during voyages.

Article 3A (d) provides that General Agent shall procure the Master, subject only to approval by the government. (R. 151.) Thus the Agent is left free to designate its own employees as Masters, remove them if they are not satisfactory and appoint successors, provided only that the successors are approved by the W.S.A. The fact that the Master is to become an employee of the United States does not mean that he cannot at the same time be an agent for the Company.

Indeed, as a practical matter, the company could not discharge its duties under the contract, as discussed below, unless the Master were its agent for these purposes.

Articles 3A (c), 4 (a) and 7 refer to the maintenance of the vessels by the general agent, the keeping of records by it of the management, operation, conduct of business of such vessels, including statements of operation, and also provide that the government shall reimburse the agent for all expenses, with certain limited exceptions, including expenses for the maintenance, management, operation or the conduct of the business of the vessels. It is to be noted that the term "operation" is used without qualification along with maintenance and other duties imposed on the Agent and ordinarily performed in connection with the operation of ships. See R. 151, 154, 155.)

Article 6 deals with the selection of agents by the General Agent and with the assignment of vessels by it to berth operators. R. 154.) If the Agent did not have control and operation of the vessels it obviously could not assign them to others. Moreover, the authority to select agents can have no meaning except in the discharge of the duties of the General Agent under the contract and there is thus no reason why it should not have designated agents among the officers of the ship including at least the Captain and purser, to discharge its duties while at sea or abroad.

Article 14, in imposing the duty to maintain the vessel in an efficient state of repair and to exercise reasonable diligence in making inspections for that purpose. (R. 159.) No qualification is made to relieve the agent of this duty while the vessel is on voyage. The term

"maintain" of itself connotes a continuing duty as is one normally incident to the operation of a ship.

Article 16 provides that the Agent shall be indemnified for claims, including personal injuries, "connected with the operation or use of said vessels." (R. 160.) Similarly, Article 8 provides for insurance of the Agent against insurable risks of all kinds. (R. 156.) Even if it be held that a provision for indemnity or insurance is not an admission of liability, it must be conceded that this provision could have no meaning unless the Agent were intended to be the operator in fact of the vessel. It fits in perfectly with the effect of the other provisions listed above and this effect that the Agent shall not be the operator in fact of the ship during its voyages.

Merely because such operations are to be conducted in accordance with strict wartime government orders and regulations cannot of itself defeat the responsibilities of the Agent in conducting such operations any more than for any private company operating in time of war with government owned equipment and under government supervision. Likewise, the mere fact that the Master is to have full control and responsibility for the "navigation and management of the vessel," as provided in *Article 3A (d),* does not contradict this fact for the reason that under maritime law the master of a ship always has this power and responsibility, regardless of the person liable as owner or operator of the ship in the event of accident. Such a provision is even more natural in time of war and if it has any special meaning must have been intended to refer to laying the ship's course and to navigational problems arising under wartime conditions. Thus, such a provision

is wholly immaterial to the issues of whether the agent is the operator of the ship for all normal purposes.

The conclusion that the company was in fact the operator of the vessel is even more conclusively established by *Articles 11 and 12* dealing with termination of the contract and which provide that the government may terminate the agreement and "assume control" of the ships and that the ships "in the custody of the General Agent pursuant to this agreement" shall then be "turned over" to the United States, although the Agent may be required to complete the business of voyages commenced prior to the date of termination. R. 157-8.) These provisions make clear the intent that until such time control over the operations of the ships was to be vested in the Agent Company. If the ships were being operated in fact by the government and not by the Agent, the Agent would not have their physical custody and could not "turn them over" to the party which was already operating them. Moreover, the provision that the Agent may be required to complete the business of voyages undertaken prior to termination shows a clear recognition that while en route the ships are operated and controlled by the Agent.

B. Contract Provisions Establishing Defendant as Employer of the Crew.

We again submit that once it is established that the Agent is the operator in fact of the vessel that fact alone is indicative of a sufficient measure of control over the crew to make the operator responsible as their employer. In this case, however, the Oregon Supreme Court would hold that this result is prevented by *Article 3A (d)* of the contract, which

designates the master as an employee of the United States and gives him control over the ship while at sea. (R. 21.) This makes necessary a re-analysis of that provision.

Although, as pointed out above (supra, p. 29), the Master was procured by the Company under *Article 3A (d)*, there is nothing to prevent the Master from also being the agent of the Steamship Company for the purpose of carrying out the duties imposed upon it by the contract and which could not be performed by the Company, as a practical matter, unless the Master were its agent. It follows that the Master, as agent for the company responsible under the contract for the operation of the ship, as we have seen, then engages a crew not only to enable him to carry out his duties to the United States in connection with the navigation of a ship in time of war, but also on behalf of the Company in order to enable him to carry out the duties imposed on the company by the contract, including the operation of the ship. There is, of course, nothing to prevent a person from being an employee of two masters at the same time.

Moreover, the fact that the Master is stated in that section to be the employee of the United States does not necessarily mean that the crew is also employed by the United States. The intent that the crew were not to be employees of the United States, at least exclusively, is made clear beyond doubt by the fact that although the Master is designated as an employee of the United States there are no similar words indicating that the crew are employees of the United States. It is provided only that the Agent shall "procure" the crew for "engagement"

by the Master. Had the parties intended that the crew then become solely the employees of the United States it would seem natural that the careful draftsmen who prepared this agreement would have stated that they, like the Master, should be employees of the United States. One of the cardinal principles of statutory construction is that of "expressio unius est exclusio alterius." The conclusion reached by application of this principle to *Article 3A (d)* is further supported by other provisions of the agreement showing an intent that the Agent be at least a joint employer of the crew for purpose of performing the duties imposed upon it by the agreement.

As the Court must recognize, one isolated and at best ambiguous provision of a contract cannot alone be looked to to strip thousands of seamen of their long established rights, but must be viewed in the light of the contract as a whole, as well as in the light of controlling statutes, regulations and established legal precedent. As this Court well knows, contract provisions are, if possible, to be construed not only to establish harmony with other provisions of the same contract as well as controlling statutes, but also in a manner that will not render the contract illegal or invalid. Such a construction of *Article 3A (d)* is all that we ask in this case.

But while paying lip service to this rule the Oregon Supreme Court would dismiss the plain implications of the other contract provisions relied upon by petitioner because, in the view of the Court, they are not consistent with what the Court views as the meaning of one isolated section, *Article 3A (d)*. (R. 21.) We submit that this is to make "The tail wag the dog."

particularly when the language of the additional contract provisions mentioned above and below is considered and when the peculiar language of *Article 3A (d)* is fully noted and understood, as explained above. To hold that this section alone results in the conclusion that the Agent is not the operator of the ship while at sea nor the employer of the crew is to place wholly undue emphasis on a provision which can reasonably be construed in a way entirely consistent with other provisions showing an intent to constitute the Agent as the operator of the ship and at least as the joint employer of its crew.

To go further and state, as would be held by the Oregon Court (R. 21) that the Agent could not maintain or repair the ship while at sea because "it had no servants or employees on the vessel to do this work" begs the entire question whether the crew were the employees of the defendant, even for the limited purpose of discharging its duties under the agreement. It also ignores the probability that the General Agent would, under *Article 6,* designate agents among the officers or crew to discharge its duties while the vessel was at sea or abroad. (R. 154.) Any other conclusion would not only conflict with the plain meaning of other provisions of the contract, but would also result in a construction of the contract granting immunity from suit in violation of the principle established in the *Brady* case.

Article 7 of the contract provides that the Agent shall be reimbursed for "wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness. (R. 155.) It

is hard to conceive of a more complete cataloging of the responsibilities of a maritime employer to his employees. Furthermore, this provision makes it clear that the functions giving rise to each of these possible liabilities is to be performed by the Agent. Moreover, this section provides for reimbursement for Social Security taxes paid by the Agent as agents or otherwise. Since, at least prior to Public Law 17, Social Security taxes could be assessed only for private employees and not for government employees this makes even clearer an intent that the Agent be regarded as employer of the crew. There are no contract provisions indicating a contrary intent. A further indication of this intent is that if disputes arise over these matters they are to be negotiated and settled by the Agent, who is the employer-party to labor agreements about which more will be said later.

Likewise, the provision on reimbursement for compensation for personal injuries could have no effect if, as contended by the Company, all such claims are to be presented to the W.S.A. for payment. Payment by the Agent and reimbursement by the government is wholly consistent with such a theory. It is also to be noted that this provision is included in an Article dealing exclusively with reimbursement for obligations of the Agent to the crew, making clear beyond doubt an intent to thus provide for payment by the Agent for personal injuries of members of the crew.

Article 16, dealing with reimbursement to the Agent for claims arising from operation or use of the vessel, including claims for personal injury, maintenance and cure further emphasizes the intent that claims for injuries to crew members should be presented to and paid

by the Agent, rather than to the W.S.A. as urged by defendant. (R. 160.)

Further indications of an intent that the Agent perform the duties of an employer and be so regarded appear from *Article 18(b)*, which prohibits the Agent from discrimination on account of race, creed, color or national origin; and *Article 16d*, which relieves the Agent from liability growing out of labor shortages. (R. 161-2.) These provisions make it clear that the initial "procurement" of the crew by the Agent constituted their employment for all practical purposes and that the function of the Master was only to formally "engage" them in accordance with long-standing custom, thereby approving those hired by the Agent.

The most that can be said is that the crew, while perhaps becoming technically employees of the United States for the purpose of satisfying the need for strict discipline and controls in time of war, were at the same time employees of the Agent for all other purposes and in the more practical and realistic sense, indicating the normal and customary relation between the crew and the general agent which operated the ship, procured the crew, paid their wages, paid for their injuries and negotiated disputes with their union. The fact that the Agent was reimbursed for such expenses by the government can of itself no more controvert this relationship than would reimbursement of labor costs to a "cost plus" contractor. Thus it was held in the case of *Moss v. Alaska Packers Assn.*, supra, referring to the effect of the General Agency Agreement on this question:

> "It would seem, therefore, that the spirit of the agreement, as well as its letter, is that seamen

retain their status as servants of the private ship owners."

We also think it to be of extreme significance that the two principle federal labor agencies with jurisdiction over labor problems involving seamen and which have no jurisdiction over employees of the government have apparently taken the uniform position that under such General Agency Agreements the steamship companies continue to be the employers of the crews. Thus a panel of The National War Labor Board in the case of *Atlantic & Gulf Coast Agents and Pacific American Assn.*, 16 W.L.R. 23, May 6, 1944, involving some 35 companies, including the Moore-McCormack Lines, was confronted with the objection by the companies that the Board had no jurisdiction for the reason that "the United States, not the general agents, is the employer . . ." The panel pointed out that the W.S.A. had directed the steamship companies to negotiate contracts with the unions and that the NLRB had ruled that a general agent of the W.S.A. is the employer of the crews. Despite objection by the companies the Board adopted the panel report and assumed jurisdiction over the case, deciding, among other things, that seamen remained subject to discharge by the agent steamship companies if not satisfactory to the companies, as well as fixing wages and working conditions to be adopted by the companies and unions as parts of their working agreements. Since then the War Labor Board has made several other decisions in disputes between the same steamship companies and the unions and has made further changes in wages and working conditions. For example, see *Pacific American Shipowners Assn.*, 14 L.R.R. 814 and 16 L.R.R. 790.

Likewise, in the National Labor Relations Board case of *Barge Carriers, Inc.*, Case No. 10-C-1382, reported in *Lawyers Guild Review*, March-April issue, 1944, at page 38, the companies set up a similar defense, but the examiner held as follows:

> "The acquisition by the WSA of the vessels and the execution of the General Agency Agreement effected no change in the relationship betwen the respondent and the employees here concerned. Nor, despite the control exercised by the WSA over the sailings and cargo of the vessels, has there been any change in, or attempt by the WSA to change the working conditions of the employees. Realistically, it is plain that the labor policies concerning these seamen are controlled entirely by the respondent, under only minimal supervision of the WSA. The creation of the WSA and the vesting in it of control over the shipping of the United States was a temporary measure designed to utilize more effectively such shipping for the prosecution of the war. The control exercised by the WSA over the respondent's operations has been concerned largely with voyages and cargo, and not with labor relations. In excepting the United States as an employer from the application of the (N.L.R.) Act, the Congress cannot have intended, the exception to apply to a situation in which, for all practical purposes, the essential elements of the employer-employee relationship remain in the control of the private operator, under only nominal aid and temporary supervision of the WSA."

Point III. The Oregon Supreme Court Also Failed to Properly Consider Other Evidence Sufficient to Sustain the Finding by the Jury That for the Purposes of the Jones Act Respondent Was the Employer of the Petitioner, Operator of the Ship and Liable for Its Negligent Operation.

First, let it be said that plaintiff has never agreed that the question of the employer-employee relationship in this case is purely one of law, as indicated by the Oregon Supreme Court (R. 25). Surely this Court is realistic enough to know that even though a contract by its terms designates a party as an employer or an independent contractor and even goes further and provides that he shall have certain powers, the determination whether he is in actuality an employer or an independent contractor depends as much upon what is actually done under the contract as upon its bare terms. The contract is but one of the elements to be considered in this connection. Thus, the Courts have declined to state any hard and fast rule for determining the existence of the employer-employee relationship, but rely upon the application of various tests such as control, hiring, payment of wages, and power to discharge, all of which in effect call for determinations of fact as well as low.

A. Collective Bargaining Agreements Between Company and Unions.

The record shows that at the time of the accident in this case respondent company was under at least five collective b rgaining agreements with various unions, all of which designated the Moore-McCormack Lines, Inc. (or the Pacific Republic Lines, its prototype on the Pacific Coast, R. 101), as one of the "employers."

(See Ex. 14, 15, 18, 19, 20. Admitted R. 114, 115. By agreement of counsel these union agreements were not printed, although remaining as parts of the record. R. 177.) It is true that subsequent to the execution of these contracts the unions signed a so-called "Statement of Policy" setting forth Section 3A (d) of the General Agency Agreement, "freezing" the terms of union contracts for the duration of the war, agreeing that the unions should "cooperate" with the War Shipping Administration in maintaining discipline aboard ship and not exercise their right to strike. (See R. 167-8. Nothing in this statement indicated, however, that this statement was to be anything more than indicated by its title, namely, a mere expression of policy. There was nothing to indicate that the W.S.A. was to be substituted for the companies as the employer under the union contracts and it was made clear not only that the crews would be procured by the agents in the usual manner, but that disputes should be settled by collective bargaining between the companies and the unions as set forth in their agreements. (Idem.)

As stated in the *Moss* case, supra, in holding that under the General Agency Agreements the crews continued to be employees of the steamship companies and in commenting upon this "Statement of Policy":

> "The Statement of Policy announced by the War Shipping Administration, in explanation of that part of the service agreement, having to do with the hiring of merchant seamen, specifically provides that agreements between unions and private ship owners be continued and that seamen be employed pursuant to such agreements."

Conclusive evidence of the fact that neither this Statement of Policy nor the General Agency Agreement itself changed the employer-employee relationship previously existing between the steamship companies and union members is to be found in the fact that the companies and unions continued to bargain as employer and as employee-representatives. Thus these parties proceeded later to negotiate supplemental agreements for overtime pay to seamen (See Ex. 15, p. 64, R. 114; Ex. 20, p. 20, R. 115); (see also Ex. 14, pp. 33-5). In addition, as previously noted the National War Labor Board continued to take jurisdiction over disputes between the companies and unions and to regard the companies as the employers of the crews.

The Oregon Supreme Court, however, took the position that because the Statement of Policy set forth Article 3A (d) of the Agency Agreement, extended the duration of collective bargaining agreements and contained certain restrictions on the activities of the crews, it was brought home to the Unions that the W.S.A. had taken over the companies' status as employer. (R. 24-5.) We submit that this holding is particularly vulnerable in that it not only begs the question of the effect of Section 3A (d) and of the Statement of Policy, but also assumes that the unions at the time they signed the statement had a clear understanding of the meaning and effect of these contract provisions in accordance with the position later taken by this respondent.

To attribute to the union an understanding of a contract concerning which the Oregon Supreme Court has admitted that the Courts themselves are in irreconcilable conflict at the present time and to go further and

assume that they must have agreed with an interpretation of those provisions directly contrary to their interests goes wholly beyond the limits of reality and human experience. It is far more reasonable to assume that the unions understood that the Statement of Policy meant what it said in stating that union contracts were to be frozen for the duration and that this included "freezing" of the employer-employee relationship between private companies and union members. The most that can be fairly inferred is an understanding that although the union would continue dealings with private operators and that although such operations would continue to deal with the unions in many customary ways, the United States was to assume a portion of the employer prerogatives deemed necessary for wartime controls, which were to be shared by the government and operators as joint employers. Moreover, the mere fact that the W.S.A. ordered the extension of the union contracts is no different than similar orders frequently issued by the War Labor Board to employers and unions concerning whom there is no question of intervention by the government as employer.

We thus submit that if lawyers and judges cannot agree on the effect of Section 3A (d) or of the Statement of Policy it cannot be said that unions having notice of their terms were thereby put on notice that the steamship companies were no longer responsible as the employers of seamen. Much less can it be said that it would thereby follow that all common seamen would be put on notice of these same facts to the extent of disclosure required in the case of *Lewis v. U. S. Navigation Co., Inc.*, 57 F. Supp. 652 at 655.

B. Other Evidence of Liability.

1. Payment of Wages.

The record shows that wages were paid in cash in envelopes bearing the name of the company. (Ex. 2c, R. 54, 141.) The Oregon Supreme Court dismisses this by accepting the company statement that these envelopes were used as a matter of economy because they were on hand (R. 22). Yet the company witness was unable to testify that such material was not printed after the Agency Agreement of 4-4-42 (R. 118-22) and the fact remains that the company paid the crew wages in such envelopes. Moreover, it is not disputed that bonus payments were paid by checks issued by and on the company (R. 62). This exhibit also shows that actual deductions were made for social security taxes, which is entirely inconsistent with respondents' claim that the crew were government employees, at least prior to passage of Public Law 17. Thus it is clear that this element of the employer-employee relationship points toward employment by the company.

2. Crew-Pass and Muster Cards.

The Oregon Supreme Court recognizes that seamen were given crew pass and muster cards by the chief mate bearing the company name (Ex. 1; R. 52, 141), but states that there was nothing to show that the issuance of such cards were authorized by the defendant as its own act. (R. 22.) We submit, however, thit it is highly strained to assume that the chief mate had no authority from the company to issue these cards. It is not only in accord with the presumption of legality but also in accord with contract provisions and other evidence pointing toward defendant as the operator of the ship and employer of the crew to infer that the

chief mate was furnished with such forms by the defendant and issued them as its agent appointed in accordance with authority granted in Section 6 of G.A.A. 4-4-42.

3. Withholding Tax Forms.

It is conceded that the company issued to a member of the crew a printed U. S. Treasury tax withholding form in which the company name appears under the words "employer by whom paid" and that for the purpose of this tax the defendant was deemed to be an employer. (Ex. 16; R. 109, 144, 22.)

4. Correspondence Between W.S.A. and Company Regarding Claim by Petitioner.

There was introduced in evidence correspondence to show not necessarily an admission of liability, but the practical construction which the War Shipping Administration and the respondent Company had placed upon the agency agreement with particular reference to the obligation of the Company to adjust and/or litigate claims for damages which might accrue in respect to operation of the vessel by the agent operator. (Ex. 17, R. 129, 145-8.) Examination of the correspondence in question will reveal the statement of the general counsel for the W.S.A. that:

> "It would seem that this event is clearly a marine risk and that, therefor, it is a matter to be taken up by you with your marine P. & I. Underwriters." (R. 147.)

It was petitioner's contention at the trial that the foregoing language of the Assistant General Counsel, followed by compliance with the instructions thereby given, evidenced an interpretation of the contract by

both parties to the contract that the obligation and duty of adjustment of claims for damages was imposed by the contract upon the general agent. When the Assistant General Counsel stated that Respondent's claim was a marine risk and that "therefor" it should be referred to the Company's own P. & I. underwriters, that constituted a construction of the General Agency Agreement that those risks which were not war risks, should, under the Agreement be adjusted, and/or litigated by the general agent in cooperation with its own P. & I. Underwriters. We take it that a claim for damages may be adjusted in one of two ways, i.e., by compromise or by litigation. In the process of compromising a claim, the company's claim agent and the representatives of the P. & I. Underwriters would, we assume, carefully investigate the facts attending the claim, both as regards liability and the extent of injury.

It would seem anomalous indeed that the claim agent for the operating company, in cooperation with the P. & I. Underwriters, should undertake the processing of a claim for damages and when negotiations for settlement should fail, wash their hands of the entire matter by simply instructing the claimant to assert his claim against the War Shipping Administration by filing an election so to do under General Order 32. Such a procedure would be awkward and impracticable and nothing will be found in the contract or under the pertinent legislation and or executive orders which would give sanction to such an unusual procedure. That the Assistant General Counsel was correct in his conclusion that the defendant Company should as a part of its duty under the Agreement, undertake adjustment of the claim through its own P. & I. Underwriters is evidenced

by Article 7 of Agency Agreement wherein it is provided that:

> "To the extent not recovered from insurance, the United States shall also reimburse the general agent for all crew expenditures—including, without limitation, all disbursement for or on account of . . . . damages or compensation for death or personal injury, . . ." (Ex. 21; R. 116, 155.)

We call particular attention to the clause, supra, "to the extent not recovered from insurance." That language would seem clearly to imply that before the general agent might receive reimbursement upon a crew expenditure involving damages or compensation for personal injury, the general agent must first recover from the P. & I. Underwriters the amount of their liability and that any excess above that amount that the general agent might be required to pay would, by the same token, entitle the general agent to reimbursement therefor. We can well understand why the general counsel for the War Shipping Administration directed the agent to undertake adjustment of the claim with appellant's own underwriters because the United States had paid premiums to the P. & I. Underwriters covering this liability and therefore the primary obligation was that of appellant's own P. & I. Underwriters. It would seem to follow as a corollary too, that since the P. & I. coverage was taken out in the name of the general agent, that the claim should be asserted against the general agent, initially upon an attempt to compromise and finally upon an action against the general agent should negotiations for compromise fail.

5. Evidence of Responsibility for Negligent Operation of Ship.

We submit that there can be no denial that the absence of the customary light in the ship's locker and the absence of the customary guard chain around the otherwise unguarded hatchway through which petitioner fell furnished ample evidence to sustain the jury's verdict which necessarily included an implicit finding of negligence in the maintenance of the ship (including the failure to furnish a safe place for petitioner to work), as well as of negligence in the general operation of the ship. As noted above, the Agency Agreement expressly imposed upon respondent the duty to maintain the vessel, as well as to operate it. (Supra, pp. 30, 31.)

In addition, respondent admitted in its answer "that at the time of the accident alleged it was operating the Liberty ship "S.S. MARK HANNA" for and on behalf of the United States of America, represented by the War Shipping Administration, under a written Agency Agreement prescribing and limiting the duties, authorities and functions of this defendant." (Dfts. Answer Par. I, R. 6; see also testimony of defendant's witness Tripp, R. 116.) We submit that this constitutes an express admission that respondent was the operator of the ship, that it was therefore responsible for its negligent operation, and that this admission, together with the other evidence that respondent was the operator and that the ship was negligently operated and maintained, furnished ample basis for the jury's verdict that respondent was liable for the injury which clearly was the proximate result of such negligence.

The Oregon Supreme Court, however, would hold that there is no evidence that the ship was not properly equipped when it started the voyage nor that respondent was responsible for the order directing petitioner to enter the locker, and that since under the Agency Agreement it was merely to procure the master and crew for employment by the United States it was not responsible for their conduct to the petitioner. (R. 37.) The Court held moreover that the admission of operation of the ship did go further than the extent authorized in the Agency Agreement. (R. 38.)

It is evident that this position begs the entire question whether respondent was the operator of the ship and, as such, responsible for negligence in its operation, as well as the question of whether the crew were its employees, at least for the purpose of discharging its duties of operation and maintenance. Moreover, it is evident that the Court denied relief primarily upon the provisions of the General Agency Agreement, as it construed those provisions as limitations upon the responsibility of the company as operator of the ship. In so doing the Court again refused to recognize and apply the rule recognized by this Court in the *Brady case,* supra, that a steamship company cannot escape liability to a third party by virtue of contract provisions with the government.

Finally, as we will demonstrate below, a steamship company under General Agency Agreement with the War Shipping Administration thereby becomes the owner "pro hac vice" of the ship and as such is fully responsible for all injuries resulting from negligent maintenance or operation.

Point IV. The Oregon Supreme Court Failed to Properly Construe and Apply the Provisions of Public Law 17 Which Confirmed the Intent That Under Standard General Agency Agreements the Steamship Companies Were to Be Responsible for Purposes of the Jones Act as the Employers of the Crews and Operators of the Ships, and Were to Be Liable for Injuries Resulting From Their Negligent Operation.

While it is true that Public Law 17 (50 U.S.C. Sec. 1291; 57 Stat. 45), otherwise known as the War Shipping Administration Classification Act, contains references to members of crews on ships under General Agency Agreements as employees of the United States, we submit that a consideration of the Act as a whole, together with the House and Senate Reports upon the Act, show an unmistakable intent by Congress to preserve inviolate the rights of seamen under the Jones Act against private steamship companies.

Section 1 (a) of the Act provides, in part, that:

> "Officers and members of crews . . . employed on United States . . . vessels as employees of the United States through the War Shipping Administration shall, with respect to . . . (2) . . . injuries . . . have all of the rights . . . under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels . . ."

We agree with the conclusion of the Oregon Supreme Court that the Act creates no new rights for such seamen as against general agents. (R. 32-3.) Our point of difference is that we contend that Congress

in House Report No. 107, 78th Congress, 1943 A.M.C. 611, recognized that seamen on merchant ships under General Agency Agreements had such a right prior to Public Law 17 and that such right was not affected by the passage of that Act. One of the principal purposes of the Act was simply, as its names implies, to "clarify certain provisions of law." (See preface to Act.) The Oregon Supreme Court would hold, however, that the very enactment of Public Law 17 is inconsistent with petitioners' position since if seamen already had a right to sue general agents under the Jones Act no such legislation was necessary. (R. 27-8.) The answer is that the Act intended merely to "clarify" previously existing rights and duties, as noted above. Thus petitioner contends that the Act neither abolished any rights on the part of seamen on merchant ships operated under F.A.A. 4-4-42 agreements, neither did it create any new right for such seamen (although doing so for seamen in some other situations) but only provided that such seamen could, if they so elected, pursue the same remedy against the W.S.A.

A. Provisions Indicating Intent That General Agent Should Operate Ships and Employ Their Crews.

In the first place, House Report No. 107 makes it clear that Congress intended that ships under General Agency Agreements were to be "*operated* by experienced steamship companies." (1943 A.M.C. at 617.) Congress recognized that the W.S.A., with its extremely limited staff, could not undertake the actual operation of hundreds of merchant vessels and that, on the other hand, "the facilities, managerial skill, and operating technique of established private organizations" should be utilized for this purpose. (Id. at 614.) There is nothing to show an intent of anyone that the War Shipping Administration should do more than supervise,

control generally and otherwise allocate merchant vessels to be actually operated by experienced steamship companies.

We understand the rule to be that when a vessel is away from the home port, it is in the custody of the master at all times and that the master is responsible for its navigation, for its management and for the conduct of all business relating to the operation of the ship. Since the agent agrees to manage and conduct the business of the vessel, necessarily the agent would have to do that through the master and this responsibility is not limited by the General Agency Agreement to those limited periods of time when the vessel might be in port. Since the operating company could take no step except through its agents, the master and, ipso facto, the crew, were in truth and in fact and as we view it through the terminology of the contract itself, agents and employees of the steamship companies under Article 6 of the G.A.A. 4-4-42 with regard to the duties undertaken by the operating company in the management and conduct of business of the vessel and in performance of the numerous other duties reposed upon the company by the terms of the Agency Agreement.

Moreover, in view of what we submit to be the clear intent of the Congress under Public Law 17 and the clear purport of the Agency Agreement to place the responsibility and the duty of the actual physical management and operation of the vessels in the hands of the general agent, it must follow that the general agent must necessarily have assumed control and direction over the crew to the extent necessary to become their employer, at least for the purpose of all operations and duties other than the controls retained by the War

Shipping Administration as necessary war-time measures.

The intent that the general agent was to be regarded as employer of the crew for all such practical purposes is further emphasized by indications in House Report No. 107, supra, that the general agent was to procure *his* sea-going personnel through his customary channels (1943 A.M.C. at 617) and that seamen were regarded as only "technically Government employees." (Id. at 625.)

B. Provisions Indicating Intent That Rights of Suit Under Jones Act Preserved to Seamen.

We now turn to provisions of the House and Senate Reports indicating not only an intent that the general agents were to be the operators of the ships and employers of their crews, at least for the practical purposes of conducting such operations, but a specific intent that seamen had and retained despite provisions of the Act for administrative remedies, all of their former rights of suit against the private steamship operators under the Jones Act.

Thus in the initial paragraph of House Report No. 107 it is stated that:

> "They will continue to have the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances, and they (and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. Such seamen will have the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act . . ." (1943 AMC at 606.)

Again, in the following section of this report it is stated that:

> "They are not to be covered under the United States Employees' Compensation Act because they and their dependents have the right to sue for indemnity or damages under the Jones Act in case of death or injury . . ." (Id., at 607.)

Thus, it is expressly stated that:

> "The basic scope and philosophy of the measure is to preserve private rights of seamen while utilizing the merchant marine to the utmost for public wartime benefits." (Idem.)

The report also recognizes that because of the decision in the *Brady* case there was a distinct possibility that at the time of the passage of the Act and prior thereto agent operators were under an independent liability to seamen on claims for personal injuries. (Id. at 611, 635.)

Later in the Report, after describing the rights of seamen privately employed, as including rights of action in Federal or State Courts, it is stated that:

> "In addition to these peacetime remedial provisions, additional benefits for war conditions are now provided to all seamen whether private or Government employees under the decisions of the Maritime War Emergency Board." (Id. at 620.)

These provisions make abundantly clear the intent of later statements in the report to the effect that seamen on ships under General Agency Agreements are to have their rights determined the same as if in private

employment (Id., at 622 and 625) and demonstrate the fallacy of the position taken by the Oregon Supreme Court to the effect that these rights could only be enforced through the administrative procedures established under Public Law 17. Moreover, if such were true, seamen would be wholly deprived of their right to trial by jury and to bring suit in State Courts, both of which are substantial rights, without which seamen would not continue to have the "same rights" as intended under this act. (See *Bailey v. Central Vermont Ry.*, 319 U.S. 350; *Tennant v. Periot R. P. Ry. Co.*, 321 U.S. 29, 35.

The same intent expressed in the House Report is expressed in the Senate Report on the Act in stating that:

> "Inasmuch as seamen covered by Section 1 will be entitled to the rights provided under the Jones Act and general maritime law *and* to the remedies under the Suits in Admiralty Act, they are expressly excluded from any benefits which would otherwise accrue as employees of the United States under the United States Employees' Compensation Act. This eliminates the danger that seamen might recover both against the Federal employees' compensation fund and under statutory or common-law remedies for the same injury." (Senate Report No. 1813, 77th Congress, 2nd Session.) (Emphasis supplied.)

This quotation is also relied upon in *Gay v. Pope & Talbot, Inc.*, 47 NYS (2d) 16, in which the Court, after analysis of Public Law 17, reaches the conclusion with which we agree, that:

> "Thus it is clear that the congressional intent was to afford to seamen an election to enforce their claims for injuries under the Suits in Admiralty Act rather than an exclusive remedy thereunder."

The same conclusion is apparent from the provisions of General Order No. 32 (8 Fed. Reg. No. 81, p. 5414) issued on April 22, 1943, and providing by Sections 304.22 (b) and 304.28 that seamen injured between October 1, 1941, and the enactment of Public Law 17 on March 24, 1943 (as was this petitioner) may have an election to sue either in the manner provided by the Act or to enforce his rights as previously existing. (Also note that Section 304.20 expressly recognizes that ships under general agency agreements are "operated by an Agent.").

Thus, even if it be true that Public Law 17 may be construed so as to limit the remedy of seamen on ships under Agency Agreements and injured after the date of its enactment, it is made clear by the use of the term "election" that at least prior to that date such seamen had other remedies. That such remedies included the right to sue the private steamship operator under the Jones Act is made clear by the House and Senate reports to which references have already been made above.

In any event, we submit that there can be no doubt but that even if Public Law 17 was intended to limit the remedy for such seamen, it fails to satisfy the rule of the *Brady* case, supra, that the long-established rights of seamen cannot be presumed to have been limited or destroyed in the absence of a clear and unambiguous statement of Congressional intent by appropriate legislation for that purpose.

Point V. The Oregon Supreme Court Failed to Recognize That Companies Engaged in the Operation of Vessels Under General Agency Agreements Are Owners "Pro Hac Vice" and Thus Liable Under the Jones Act to Seamen Employed on Such Ships for Injuries Due to Their Negligent Operation, Regardless of Whether Such Seamen May Technically Be Employees of the Government.

The General Agency Agreement between the War Shipping Administration and the private operators did not result only in a relationship of employer and employee. As we have demonstrated above, the respondents undertook, for a consideration, to manage and operate the vessels for the War Shipping Administration. This very fact alone, aside of all other considerations, imposed an operator's liability upon the respondent. As also pointed out above (supra, pp. 22, 23, 27, 28), the United States Government, for very practical reasons, has refrained from managing and operating its own vessels in trade and commerce, but has seen fit to enter into agreements with experienced private operators, whereby the latter, in the interest of efficiency and economy, should continue the management and operation of merchant vessels in trade and commerce. The private operators of these vessels are subject to the same liabilities flowing from the operation of their own vessels or vessels which they may have been operating under charter. Thus, as we will demonstrate further below, it is the fact of management and operation of the vessel which controls and not employment.

In *Armit v. Loveland,* 115 F. (2d) 308, decided by the Third Circuit Court of Appeals, the plaintiff sued three defendants under the Jones Act. One was the vessel owner before the accident; another took title to

the vessel after the accident, but affiliated with the first owner; and the third defendant operated the vessel at the time of the accident. The Court held that all three defendants were liable on the ground that all were in some way tied up with the *operation* of the vessel. The case illustrates the liability of all those who have any share in the ship's operation. The responsibility vested not because of the ownership, but because of their participation in the management of the vessel.

Under certain forms of charters, where the possession and management of the vessel is given to the charterer, the charterer becomes owner of the vessel for the voyage or service stipulated and consequently becomes subject to the duties and responsibilities of ownership. *U. S. v. Shea,* 152 U.S. 178; *Leary v. U. S.,* 81 U.S. 607; *Reed v. U. S.,* 78 U.S. 591.

A distinction is drawn between a charter which merely provides for the use of the vessel by the charterer with the possession and management retained by the owner, and one which gives the charterer the possession and management. In the former case, it is known as a time charter with no responsibilities of ownership attaching. In the latter case, the charterer becomes owner "pro hac vice" with all the consequent rights and obligations. *U. S. v. Shea,* supra; *Leary v. U. S.,* supra; *Reed v. U. S.,* supra; *Clyde Commercial Steamships v. U. S. Shipping Co.,* 152 Fed. 516; *"The Del Norte,"* 111 Fed. 542. In the case at bar, it will be noted that both the possession and management were vested in the defendant. This alone clearly puts the defendant in position of owner "pro hac vice," entirely aside of any other refinements in the contract.

Where the management and possession of the vessel are given up to the shipping company, it is immaterial that the general owner by the terms of the contract is required to provide the crew, U. S. v. Shea, supra; *Hills v. Leeds,* 149 Fed. 878; *or to pay their wages, "The Charlotte,"* 285 Fed. 84, aff. 299 Fed. 595, cert. den. 266 U.S. 604; *Hills v. Leeds,* supra; or that the owner should assume responsibility as to fire or marine risk, *Hills v. Leeds,* supra; *Middlebrook v. U. S.,* 67 Ct. Cl. 294, cert. den. 280 U.S. 564; or that the owner should insure the vessel, *Golcar S.S. Co. v. Tweedie Trading Company,* 146 Fed. 563; or pay for insurance on it, *"The Barnstable,"* 181 U.S. 464; *or that the Captain or other officers and crew should be appointed by the owner. "The Del Norte,"* supra; *American Steel Barge Co. v. Cargo of Coal,* 107 Fed. 964; *"The Charlotte,"* supra; or that the owner should provision and equip the ship during the voyage, *In Re Certain Logs of Mahogany,* 5 Fed. Cas. No. 2, 559; or that disbursements beyond a fixed sum cannot be made without the consent of the owner, *"The Nat. E. Sutton,"* 42 F. (2d) 229; or that the general owner shall have the right to cancel and terminate the charter party of taking possession of the vessel at any time wherever it might be found, *Rich v. Jordan,* 164 Mass. 127. Congress has recognized and legislated, for purposes of limitation of liability proceedings, that a demise charterer may be deemed an owner and limit his liability. (R.S. 4286, 46 U.S.C. 186.)

It is thus clearly evident that under the general law, one who is given the possession and management of a vessel is clothed, especially with respect to third parties, with all rights and liabilities of an operating owner. It is not the name which is placed on an agree-

ment which determines the status of the parties, but the effect of the provisions. In other words, if the charterer were merely getting the use of the vessel, then he is only a time charterer and not an owner "pro hac vice." On the other hand, as in this case, if he is vested with the possession and management of the vessel, then he is the owner "pro hac vice" with consequent rights and liabilities.

As we have demonstrated above, the provisions of the General Agency Agreement and the other evidence on the record demonstrates clearly that respondent was at least the operator of the ship, even if not the employer of the crew. We thus submit that upon the basis of this fact alone respondent, as owner "pro hac vice," is liable under the Jones Act for all injuries resulting from the negligent operation of the ship and that the Oregon Supreme Court deprived this petitioner of his rights under the Jones Act in failing to so hold.

CONCLUSION

Without repeating the summary of the arguments relied on in support of the petition for certiorari submitted herewith and as summarized in said petition (supra, pp. 14 to 18) for the convenience of the Court, we submit that the Supreme Court of the State of Oregon refuses to recognize the inescapable fact that as a realistic matter a steamship company designated as a general agent of the War Shipping Administration continues to be the operator of the ships assigned to it and the employer of their crews. Instead, the Oregon Court based its decision upon the acceptance of a legalistic device under which respondent company seeks to escape responsibility for the operation of the ship

and employment of its crew, contrary to all previously admitted custom, largely by placing a construction upon one highly ambiguous contract provision—Article 3A (d)—in disregard of plain expression contained in numerous other provisions of the same contract and other evidence or record, as well as contrary to plain statements of Congressional intent in Public Law 17, and contrary to the principles established by this Court in the *Brady* case, that liability of a general agent of the government to a third party cannot be removed merely by a change in provisions of the Agency Agreement.

We further submit that because petitioner would be thereby deprived of his rights under the Jones Act to recover in a state court after a jury trial compensation for injuries due to the negligent operation of the ship, and because of the other reasons stated in the attached petition, the Supreme Court of the State of Oregon has decided a federal question of substance not theretofore decided by this Court and has decided it in a way not in accord with applicable decisions by this Honorable Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 625

CECIL I. HUST, Petitioner and Plaintiff-Respondent below,

vs.

MOORE-McCORMACK LINES, INC., Respondent and Defendant-Appellant below.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner submits the following brief in reply to respondent's brief in opposition to the petition for writ of certiorari.

EXISTENCE OF SUBSTANTIAL FEDERAL QUESTION

On the basic question of jurisdiction respondent argues only that this case involves solely a question of fact whether petitioner was an employee of respondent and that this Court has already established that the relation of employer-employee is necessary in suits under the Jones Act (46 U.S.C. §688) and that where only one conclusion can be drawn from the evidence the Court should direct a verdict.

We do not pause again to cite cases in which this Court has taken jurisdiction even though they involve purely questions of fact. (Pet. Br. 8.) We submit, how-

ever, that regardless of whether the points referred to by respondent have been established, it cannot be denied that this Court has never decided the question whether under the standard General Agency Agreement of 4-4-42 (Dft. Ex. 21; R. 131, 149 ff; offered R. 116) an employer-employee relationship exists between steamship companies designated as general agents of the War Shipping Administration and the crews of such ships, a question affecting the rights of thousands of seamen. Likewise, we submit that there is no single and inescapable conclusion from the evidence of this case that there is no such employer-employee relationship between this company and the crew of this ship. We, of course, contend that the only conclusion that can properly be drawn is to the contrary. In any event, the conflict of decisions by lower courts on this identical question is alone conclusive that there is no such inescapable conclusion as urged by respondent (Pet. 11-12; Pet. Br. 26), aside from the evidence analyzed in petitioner's brief (pp. 28-40) which we submit is far more than substantial evidence in support of petitioner's position on the issue of the employment relationship. Moreover, the majority of such decisions, as cited in petitioner's brief and as argued therein, together with the decision of this Court in the case of *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, support the proposition that such a conclusion, as reached by the Oregon Supreme Court, is "probably not in accord with applicable decisions of this court."

EVIDENCE OF EMPLOYER-EMPLOYEE RELATIONSHIP

On this question respondent raises four points as discussed below:

1. Whether Company Responsible for Operation of Ship.

Respondent makes the flat statement, undocumented by references to contract provisions or other evidence, that:

> "The physical operation of the ship was not a duty of the Agent, but remained with the War Shipping Administration." (Resp. Brief, p. 4.)

This statement, one of the basic premises on which respondent builds its argument, merely is an assumption which wholly begs the question. That the premise is false is shown not only by the language of the general agency agreement revealing an intent that the Company be responsible for operation of the ship (Dft. Ex. 27, R. 131, 149 ff., offered R. 116, as analyzed in petitioner's brief, pp. 28 to 32), but also by other evidence, including the expressed intent of Congress itself that ships under such agreements were to be "operated by experienced steamship companies." (See Pet. Br., p. 51-2. See also *Moser v. Standard Oil Co.*, 60 F. Supp. 6, not cited in petition or supporting brief.)

2. Whether Article 3A(d) Constituted the War Shipping Administration as Employer of the Crew and Acted as Notice to Petitioner to That Effect.

Respondent next sets forth Article 3A(d) of the General Agency Agreement (supra) designating the Master as an agent and employee of the United States

and calls attention to the fact that this provision was also included in the "Statement of Policy" (Dft. Ex. 25, R. 167, offered R. 130) imputing knowledge of its contents to the petitioner. (Resp. Br. 5-6.) Respondent later argues that these provisions "make it about as clear as the English language can, that these War Shipping Administration crews . . . are not employees of the Agents." (Resp. Br. 14-5.)

Again we submit that petitioner begs the question. No attempt is made to analyze the terms of this contract provision in any way comparable to the analysis set forth in petitioner's brief and supporting the contrary conclusion that although the Master may have been agent of the United States for the purpose of seeing that necessary wartime orders and regulations were complied with, the Master was left free to act also as agent for the Company in discharging its duties under the agreement and that the crews "procured" by the steamship company "through its usual channels and in accordance with customary practices" continue as usual to be its own employees. (Pet. Br. pp. 29-30; 33-5.) Far less is it explained how the inclusion in a union agreement of a provision concerning the meaning of which the lower courts are in hopeless conflict can act as unambiguous notice to all union members that they are no longer employees of the company, as in the past, but by virtue of that contract provision alone have become employees of the United States.

3. Whether the Shipping Articles Constituted War Shipping Administration as Employer of Crew.

Respondent next argues that since the Shipping Articles were between the crew and the Master, who was an employee of the United States, it follows that the crew

were also employees of the United States. (Resp. Br. 6-7.) That this is a *non sequitor* is at once apparent when it is realized that Shipping Articles have for years been customarily signed between the crew and the Master regardless of whether both are employed by the same employer; that there is no reason why both must be employees of the same employer, and that there is nothing to prevent the owner of a ship from furnishing the Master, while the management and operation of the ship, including the employment of its crew and the assumption of all attendant liabilities, may be assumed by the charterer or owner *pro hac vice*. See *Hill v. Leeds*, 149 F. 878 (owner and charterer given equal authority over Master and vessel); *Gibson v. Manetta Co.*, 194 F. 331, at 334. See also: *The Del Norte*, 111 F. 542, aff'd. 119 F. 118; *Golcar S.S. Co. v. Tweedie Trading Co.*, 146 F. 563; *The Charlotte*, 285 F. 84, at 87.

4. Whether Revenue Code or Public Law 17 Constitute War Shipping Administration as Employer of Crews.

Respondent next quotes from the Internal Revenue Code, sec. 1621 (a) (9) referring to "services performed . . . on or in connection with any vessel as an employee of the United States employed through the War Shipping Administration . . ." (Resp. Br. 7.) There is nothing in this provision, however, to show that it was intended to apply to crews of merchant seamen on ships such as the SS "MARK HANNA" under the General Agency Agreements of 4-4-42 or that it was intended to apply other than to Masters and others who may be conceded to be employees of the United States. On the contrary, the withholding tax forms prepared in this case indicated that the company was

the "employer by whom paid" the tax for petitioner. (Pet. Br. 45.)

As for Public Law 17, which respondent quotes as referring to seamen as "employees of the United States" (Resp. Br. 7), we would refer to the analysis of this statute as a whole in petitioner's brief (pp. 50-56). It is worthy of note that respondent, while indicating that this was "merely a clarifying piece of legislation" and that seamen "still retain their rights under the Jones Act," concedes that the Act makes "one modification, viz., that their procedural remedy will be against the United States under the Suits in Admiralty Act." (Resp. Br. 7.) It follows from respondent's own argument that seamen on ships under General Agency Agreements injured prior to enactment of Public Law 17, as in this case, would be recognized by that Act to have had rights under the Jones Act for the period prior to Public Law 17, unlimited by the procedural remedy under the Suits in Admiralty Act. This is made doubly clear by provisions for "election of remedies" in such cases. (See Pet. Br. 56.)

EVIDENCE OF NEGLIGENCE

Respondent's argument that there is no evidence to support a finding of negligence on its part is based primarily on three premises.

A. That respondent was neither the operator of the ship nor the employer of the crew. (Rep. Br. 8-9).

Again, this assertion begs the question, is wholly undocumented and unsupported by references to the evidence other than the provisions of Article 3A(d) of the Agreement and to Shipping Articles (supra). On

the other hand, petitioner has called attention in his brief to at least a showing of substantial evidence to support the jury's finding that respondent was employer of the crew and, as implicit in its finding of liability, that respondent was also operator of the vessel. (Pet. Br. 28-50.)

B. That the Master had full control and responsibility for the ship, including the failure to provide a light in the locker room and a guard chain around the hatch, as well as the order to petitioner to go into the locker room, and that since the Master was an employee of the United States the respondent cannot be held liable for this accident. (Resp. Br. 9-10.)

We submit that this argument reveals the basic fallacy of respondent's entire case. We concede that the Master of a ship is customarily responsible for everything that goes on aboard ship while at sea. It does not follow, however, that simply because he is employed by the owner of the ship, the charterer or operating agent of the vessel may not still be liable for accidents resulting from negligence in its operation. This is demonstrated by the cases cited above. Supra, p. 5.)

It is an established principal of agency that although one may be in the general service of another, yet in respect to particular work he may be transferred to the service of a third person. *Standard Oil Co. v. Anderson,* 212 U.S. 215, at 220. It is also apparently established admiralty law that in many situations the Master acts as agent for all parties interested in a vessel or its cargo. Thus the obvious rationale is that there is no reason why the Master cannot be an employee of the government, at least for some purposes,

and still be an agent of the company for the purpose of performing its duties under the agency agreement. This is particularly true where, as here, the Master is furnished by the general agent, as provided under Article 3A(d), and the contract also provides that the agent is to have responsibility for both operation and maintenance of the vessel. (See Pet. Br. 28-32.)

C. That respondent's duty of maintenance was limited to overall repairs when the vessel is in port. (Resp. Br. 13-4.)

This argument is also based on the false premise that while at sea the vessel was under control of the Master and that the Master was exclusively an agent of the government. Respondent also refers vaguely to Article 14 of the Agreement as supporting this argument, but that article not only imposes the duty of making general overall repairs while the vessel is in port, but also includes "maintenance" of all "equipment," without qualification as to time or place. This is supported by references to "maintenance" in Articles 3A(c), 4(a) and 7. In a broader sense, however, this question goes back to the question previously discussed of whether the company was the operator of the ship, since responsibility for accident resulting from failure to maintain lights and guard chains must naturally fall upon the operator and all the evidence summarized in petitioner's brief, including provisions for insurance of the company against such operating risks, supports this conclusion. (See Pet. Br. 28-50.) As to the standard of care in such cases, see *Phillips v. Matson Nav. Co.*, 62 F. Supp. 247, not cited in petitioner's brief.

COMMENTS ON "FURTHER REMARKS" IN RESPONDENT'S BRIEF

1. Reliance by Respondent Upon "Immunity" Under Jones Act. (Resp. Br. 10.)

Respondent's denial of reliance upon such an immunity under the Jones Act (Rep. Br. 10) is sufficiently answered by the cases cited on the top of page 10 of the petition.

2. Application of Brady Case. (Resp. Br. 10.)

Respondent would dismiss the case of *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, as "in no respect . . . like the present case." Petitioner's brief frankly recognized certain differences between the facts of the two cases (Pet. Br. 24-5.) We submit, however, that on the basic question of the liability in this case, as affected by the terms of the agency agreement and of Public Law 17, upon which respondent relies, the following principles recognized in the *Brady* case are equally applicable here:

> "The withdrawal of the right to sue the agent for his torts would result at times in a substantial dilution of the rights of claimants . . . We can only conclude that if Congress had intended to make such an inroad on the rights of claimants it would have said so in unambiguous terms." (Id. at 581.)
>
> * * *
>
> "Moreover, if petitioner had a cause of action against respondent, it is difficult to see how she would be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained." (Id. at 583.)

3. Application of NLRB and NWLB Decisions. (Resp. Br. 11.)

Respondent would also dismiss decisions of the National Labor Relations Board and National War Labor Board holding that seamen are employees of steamship companies under similar contracts on the ground that under the recent decision of this Court in the case of *N.L.R.B. v. Hearst,* 322 U.S. 111, the term "employee" has a peculiar meaning in such proceedings not applicable under the Jones Act, which, according to petitioner, adopts the "conventional relationship as understood at common law," citing *Robinson v. B. & O. R. R. Co.,* 237 U.S. 84, and *Hull v. Philadelphia Reading R. Co.,* 252 U.S. 475. (Resp. Br. 11 and 12.) It is true that this Court over 25 years ago in the *Robinson* and *Hull* cases held to the "conventional relationship" in cases under the Employers Liability Act and refused to follow the dissent by Associate Justice Clarke in the *Hull* case that "we are not dealing here with mere words or with merely 'conventional relations,' but with very serious realities." In the *Hearst* case, however, this Court gave full recognition to the realities of the results that would follow from continuing to adopt such a "conventional" perspective in the application of social legislation, recognizing that "the context of a statute must be read in the light of the mischief to be corrected and the end to be attained." (Id., at 124.) This more realistic approach of the Court has not been limited to cases under the National Labor Relations Act.

We thus submit that since this case is apparently conceded by respondent to involve primarily a question of fact (Resp. Br. 2) and was submitted to the jury under wholly "conventional" instructions de-

scribing the employer-employee relationship (R. 135-6) there is no reason to sustain the reversal of its verdict by an appellate court by substituting its own "conventional" ideas on the subject, with which these instructions were wholly in accord, particularly in view of the realities of the situation, including the fact that seamen on ships operated by general agents of the Maritime Commission and War Shipping Administration had for years been regarded as employees of the steamship companies, the fact that this relationship would be changed only by accepting respondent's construction of contract provisions between the companies and the government, and the fact that any other result would mean that such seamen would have no remedy for injuries occuring prior to Public Law 17, and even after passage of that Act only upon surrender of their rights to trial by jury and in a court of their own state.

4. Application of Collective Bargaining Agreements Between Respondent and the Unions. (Resp. Br. 11-12.)

Respondent states that the collective bargaining agreements with the unions were made when the company "actually was an employer," and that the War Shipping Administration "modified them, insofar as employment was concerned," by the Statement of Policy which referred to Section 3A(d) of the agency agreement.

Since the Statement of Policy expressly continues in effect each and every provision of the union contracts between the unions and the companies which were still to at least "procure" the crews, it would follow that this would include a continuance of the employer-employee relationship unless it can be said that Article

3A(d) so clearly provided to the contrary that by accepting the Statement of Policy embodying that article the unions expressly agreed to an abandonment of this relationship with the companies. As we have seen, however, no agreement by the unions to abandon this basis of the long established rights of their members under the Jones Act can be found in this masterpiece of legal equivocation. (Pet. Br. 33-5; 41-3.)

5. Other Evidence of Liability. (Resp. Br. 12.)

Respondent deems the "various other items of so-called 'evidence' . . . referred to on pages 44 to 48 of petitioner's brief . . . too slight to notice . . ." We leave that question to the consideration of this Court with the sole comment that the jury found sufficient evidence as a basis for its verdict, with the result that, there being no claim of prejudicial error, that verdict must stand unless it can be said that there was absolutely no substantial evidence to support the verdict.

6. Respondents Duty to Maintain the Vessel. (Resp. Br. 13.)

This point has already been disposed of. (Supra, p. 8.)

7. Respondent as Owner "Pro Hac Vice." (Resp. Br. 14.)

Respondent charges petitioner with a lack of comprehension of the meaning of this term and states that in order to be an owner "pro hac vice" the owner must relinquish all control and the charterer must be solely responsible for manning, equipping and supplying the vessel and must exercise complete physical control over her.

We need only refer to cases cited in petitioner's brief, page 59, to show that there is no such hard and fast rule, but that many qualifications have been recognized, so long as the management and possession of the vessel is turned over to the shipping company, as clear from the provisions of the agency agreement in this case. (Pet. Br. 28 to 32. See also cases cited, supra, p. 5.)

As to the respondent's question of how the War Shipping Administration and the Agent could both be owners "pro hac vice" in view of the fact that the title of the general agency agreement refers to "vessels of which the W.S.A." is owner or owner "pro hac vice," it seems sufficient to point out:

a. That although the W.S.A. might have been the owner "pro hac vice" of some other and older ships, it has never been contended that it was other than the general owner of the newly built "Liberty" ship S.S. "MARK HANNA" and that fact has apparently been conceded. (See Ptfs. Ex. 13, R. 142; Dfts. Ex. 21, R. 149.)

b. That whether the W.S.A. was an owner "pro hac vice" is not to be determined by a mere "label" included in the title of an agreement, but by reference to its substantive provisions and to other material evidence, which, as shown in petitioner's brief (pages 28-32) leads to a contrary conclusion in this case.

CONCLUSION

Respondent concludes by making the broad claim that all of the evidence in support of petitioner's claim and carefully documented in petitioner's brief, including references to and analysis of provisions of the general agency Agreement, is "not even a scintilla when properly understood" and that the case is one based merely upon inferences inconsistent with undisputed facts. (Resp. Br. 14-5.) We assume that the respondent must regard as these "undisputed facts" its bare claims, for the most part wholly undocumented and unsupported by reference to actual evidence, such as that the company had nothing to do with the operation of the ship.

We rest confident that the facts of this case will be fully and "properly understood" by this Honorable Court with the same realistic view of the facts of economic life as exhibited in most of its recent decisions arising under other social legislation and that the Court will not be misled by the attempt of this corporation to escape reality, and liability, by the legalistic device of assuming that the ambiguous terminology of one provision of a contract between it and a government agency can sweep away all of its long existing responsibilities to the crews of its ships.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF ON THE MERITS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 625

CECIL I. HUST, Petitioner and Plaintiff-Respondent below,

vs.

MOORE-McCORMACK LINES, Inc., Respondent and Defendant-Appellant below.

PETITIONER'S REPLY BRIEF ON THE MERITS

Petitioner submits the following brief in reply to respondent's brief on the merits.

STATEMENT OF THE CASE

1. Lack of Showing of Change in Employment Practices.

In its statement of the case, respondent's brief on the merits takes issue with the following statement made in the petition filed herein:

> "Respondent did not attempt to show in what ways, if any, the actual practice of employing crews and operating ships had changed since before the war, when it would have been clearly liable in such a case, but relied principally upon the terms of the General Agency Agreement." (Petition, page 3.)

Thus respondent states that:

> "The whole effect of the evidence was that the entire shipping of the United States, and employment of crews, had undergone a vital change, namely, one from private operation under peacetime conditions to government operation under war conditions." (Resp. Br. on Merits, page 2.)

Since this conflict brings into focus some of the basic issues of this case, petitioner believes it is most significant to point out that the only evidence relied upon by respondent in its brief in support of its position that the Moore-McCormack Lines, Inc., was not the operator of the ship and the employer of the crew is as follows:

a. *The General Agency Agreement.* (Resp. Br. on Merits, pp. 4-13.) As shown by Petitioner's Brief in support of Petition for Writ of Certiorari (pp. 27-40) (hereinafter referred to as "Petitioner's Opening Brief") and as further demonstrated herein, this agreement is more reasonably susceptible of the construction contended for by petitioners and, in any event, is ineffective of itself to change respondent's liabilities to third persons, including seamen, under the decision of this Court in the case of *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575.

b. *The "Statements of Policy."* (Resp. Br. on Merits, pp. 14-16.) But these statements simply quote Article 3A(d) of the Agency Agreement and are thus no more conclusive than the agreement itself. As shown in Petitioner's Opening Brief (pages 40-43), the fact of the unions' signatures upon these statements cannot be considered as an

indication of their concurrence in respondent's construction of this disputed provision, particularly in view of other provisions of the statement involving the union of which petitioner was a member, as shown below (p. 7).

c. *The "Shipping Articles."* (Resp. Br. on Merits, pp. 16-19.) As also shown herein, these articles for years have been customarily signed between the Master and crew regardless of whether both are employed by the same employer and are in no way conclusive to the effect that the employer of the Master is thereby employer of the crew.

d. *Decisions of the lower courts,* which add nothing new in the way of evidence. (Resp. Br. on Merits, p. 19.)

e. *Public Law 17* (50 U.S.C. Sec. 1291; 57 Stat. 45), which was not enacted until after the injury herein. (Resp. Br. on Merits, p. 25.)

f. *The Internal Revenue Code,* Sec. 1621, U.S. C., Title 26, which was also enacted after the injury herein. (Resp. Br. on Merits, p. 33.)

While it may be true, as urged by respondent, that these various factors, and the Agency Agreement in particular, changed somewhat the legal relationship between the War Shipping Administration and private steamship lines, it is the position of petitioner, as further demonstrated herein, that the private steamship lines were still for all practical purposes the operators of the ships of the American Merchant Marine, at least insofar as their crews were concerned, and it is apparently conceded that the same actual practices continued insofar as employment of crews was concerned.

Petitioner further maintains that insofar as shown by the record of this case, merchant ships were still operated by the private steamship lines according to the same actual practices as under previous Agency Agreements. Respondent has wholly failed to show in what respects these actual practices differed as compared with actual practices under previous Agency Agreements, aside from reference to provisions of the revised Agency Agreement which have been fully analyzed in Petitioner's Opening Brief (pp. 28 to 37); Petitioner's Brief in reply to Respondent's Brief opposing the petition (pp. 3, 4 and 8) (hereinafter called Petitioner's First Reply Brief) and as further demonstrated below (pp. 10 to 18).

Under the "Statements of Policy" also relied upon by respondent, all union agreements were "frozen" and this must be taken as including the employer-employee relationship theretofore existing between the companies and the crews (Dft. Ex. 25; R. 165 to 173 offered R. 130). Actual hiring practices were admittedly continued under Article 3A(d), the only contract provisions referred to in the Statements of Policy. The crew was still paid by the company and issued crew pass cards, etc., by it. (Ptf. Ex. 1, 2; R. 141; offered R. 52-3.) To all outward intents and purposes, the only changes in practice, at least so far as the crew were concerned, even if they knew of Article 3A(d), were that the Master had become an employee of the United States and that the money to pay the crew was to be provided by the United States. Yet, as noted on the Shipping Articles, even the Master gave his address as in care of the Company, and was thus by fair inference one of the Company's regular employees, now also commissioned as an officer in the United States Merchant

Marine. (See Ptf. Ex. 13; R. 142; offered R. 92 and see Stipulation re Ex. 13; R. 176. See also R. 54.)

Nor is it even contended that any changes in operating or employment practices resulted from the Shipping Articles, prepared in the standard form required by statute for many years, or from either Public Law 17 or Section 1621 of the Revenue Code, both enacted after the date of injury in this case.

Thus the actual facts of operation and of employment at that time on ships operated under General Agency Agreements were not substantially different from the facts existing in many other industries vitally essential to the nation's war effort, such as the shipbuilding industry, in which the government assumed a large measure of supervisory control, built and owned plants and also furnished funds to meet payrolls, but in which actual operations were still conducted by private companies, including the employment and direction of personnel, and such companies continued to be responsible to such employees for negligence in such operations, even though the funds to be expended in meeting these obligations were likewise furnished by the government.

2. Continuation of Relationship between Company and Union.

Respondent's brief on the merits (at pages 2 and 3) also takes issue with petitioner's statement that the company and unions continued to negotiate for the settlement of disputes. Thus respondent takes the position that the testimony referred to by petitioner does not show that there ever were any disputes; that any negotiations by respondent would have been in its capacity

as agent; and that any changes in union contracts were to be made not by the agents but by mutual agreement between the W.S.A. and the unions.

While it is true that the testimony referred to does not specifically use the word "disputes," we submit that when the union business agents testified that "We deal directly with the Moore-McCormack Lines" in answer to a question as to whom the union dealt with "with respect to any *questions* that arise as to manning vessels" (R. 103) it is evident that substantially the same meaning was intended.

Moreover, the union agreement covering petitioner shows on its face that disputes arose after April 4, 1942, the date of the Agency Agreement, and that such disputes were settled by negotiations between the union and the company, through its employer's association. See "Emergency Wartime Rules" by memorandum of agreement dated December 31, 1942, between Pacific American Shipowners Association and the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association. (Ex. 15, p. 64, offered R. 114 and by stipulation not printed, but remaining as part of record. R. 177.) See also pages 35 and 36 of Ex. 15, supra, and Petitioner's Opening Brief, p. 42. For further evidence of disputes between companies and unions and of recognition by federal labor agencies that the steamship companies remained as employers of their crews, see National War Labor Board decisions cited in Petitioner's Opening Brief, page 38.

The obvious answer to respondent's argument that any action taken by the company in any dispute was in its capacity as a General Agent is that such an argu-

ment begs the entire basic question whether a general agent can be responsible as an employer and even though the statement may be true, it does not necessarily follow that the company was not the employer of the crew.

As for respondent's observation that changes in union agreements could only be made by mutual agreement between the W.S.A. and unions, it is significant to note that although the two Statements of Policy referred to by respondent for other unions included such a provision, no such provision was included in the Statement of Policy for the union of which petitioner was a member, namely, the Marine Firemen's Union. On the contrary, this Statement of Policy specifically provided not only that "existing collective bargaining agreements be frozen for the duration of the war," but unlike the other statements for some other unions, provided that:

> "(3) It is understood that all disputes will be settled through the regular machinery now in existence under the collective bargaining agreements between the unions and the steamship operators." (Dft. Ex. 25; R. 168; offered R. 130.)

Thus by agreement between the Union and the War Shipping Administration it was clearly recognized that, regardless of what other unions may have agreed upon, this union and its members, including this petitioner, retained *all* of their rights against private steamship companies and that their agreement, and that any future changes therein were not subject to control by the War Shipping Administration under respondent's theory that the W.S.A. assumed the company's position as employer under the agreement.

EVIDENCE THAT COMPANY WAS EMPLOYER OF CREW

1. The General Agency Agreement.

Respondent here takes its usual position:

> "That Service Agreement is the one which determines the status of the respondent Moore-McCormack Lines, Inc., in this case, and defines its relationship to the vessel. We must look to it, therefore, to determine whether respondent was the employer of the crew on said vessel." (Resp. Br., p. 5.)

Before discussing respondent's detailed analysis of the Agreement, petitioner would point out that once again respondent fails to come to grips with the realities of the principle recognized by this Court that the liability to a workman of a company operating as a general agent of the government cannot be removed by changes in the provisions of the contract between the company and the government. *Brady v. Roosevelt S.S. Co.*, supra, at 583.

Respondent would dismiss the *Brady* case because of certain differences between the facts of the two cases which, as we have previously shown, in no way detract from or limit the application of the principle above-stated to all working men, regardless of the nature of the statutory or common-law basis of liability that would accrue to their benefit but for the provisions of such a contract. (See Pet. Op. Br. 21-7.)

It is also of extreme significance that respondent nowhere discusses or takes issue with petitioner's argument based upon the second principle recognized by this

Court in the *Brady* case that contracts with the government must be construed in the light of the legislation enacted by Congress authorizing their execution, with the result that substantial changes in the rights and duties of government agents to third parties will not be presumed in the absence of an expression by Congress in unambiguous terms. Neither does respondent discuss or take issue with petitioner's argument based upon this principle of the *Brady* case to the effect that under the Merchant Marine Act of 1936 (46 U.S.C. Chapter 27; 49 Stat. 1985) the War Shipping Administration was given no authority to do more than "control the operation . . . and use" of merchant ships and no authority was conferred in any clear or unambiguous terms to do other than to leave the actual physical operation of such ships to private steamship lines, as in the past; and that no authority was conferred by that Act upon the W.S.A. to enter into contracts having the result of divesting such companies of their pre-existing liability to members of the crews of ships assigned to them for operation. (Pet. Op. Br. 22-24.)

Respondent's position, as quoted above, also would minimize, if not ignore, the concept that in determining the status of a party designated by contract as an agent, employer, or independent contractor, insofar as the working-men involved are concerned, the Courts will consider not only the terms of such a contract, but will attach equal, if not greater importance, to actual practices existing between the parties and such workingmen. (See Pet. Op. Br. 40.) Thus the fact that a contract may be carefully drafted to accomplish a given purpose is not conclusive upon the Courts, particularly where, as here, respondent has not shown that any changes were effected in operating or employment practices and the contract was apparently drafted, de-

liberately or otherwise, so as to leave ambiguous the true intent of the parties on the particular points here in issue, a situation not uncommon in the law.

Accordingly, although petitioner does not question respondent's statement that the contract in question was carefully drawn, this is by no means an admission that the contract is to be interpreted in accordance with respondent's views or that its terms, particularly those of Article 3A(d), are clear and unambiguous to that end. This is demonstrated beyond peradventure by the diversity of opinion in the lower courts. Nor is it conceivable that had the unions so understood the intent of these provisions they would have joined in signing Statements of Policy having the effect, as respondent would contend, of signing away their hard-fought rights under the Jones Act against the private steamship lines who were still to procure the crews and to be bound by union collective bargaining agreements.

We thus turn to respondent's analysis of the particular provisions of the Agency Agreement:

Article 1. It is at first obvious that the mere initial use of descriptive terms in the nature of legal conclusions, such as "agent" and "independent contractor," as employed by respondent, is not controlling, even on looking to the contract alone, but that the actual rights and duties elsewhere provided in the contract are the determining factors. Respondent also places emphasis upon the provision that the agent is to manage and conduct the "business" of the vessel, with the inference that it is a word of limitation and does not connote full responsibility as an operator. The word "business" has, however, been defined by this Court to be "a very

comprehensive term and embraces everything about which a person can be engaged" (*Higgins v. Commissioner of Internal Revenue,* 312 U.S. 212, 217). It is thus clear that it involves all matters related to the physical operation of a vessel. This is made further clear, as pointed out in Petitioner's Opening Brief (pp. 28-37), by the responsibilities imposed upon the agent under this contract and the fact that this same Article 1 refers to vessels as having been "*assigned*" to the agent, thus making it clear that physical possession, one of the principal attributes of an "*operator,*" no longer remained with the War Shipping Administration, but passed to the agent.

Article 2. This section likewise refers to "*business,*" as emphasized by respondent, but also to "*assignment*" of the vessels, as well as to their "*acceptance*" by the Agent, making further clear a change in physical possession.

Article 3A(a). Petitioner does not, as counsel suggests, rely upon the term "*maintain*" in this provision, but the terms "*maintain*" and "*maintenance*" in Articles 3A(c), 4(c), and 7, which make it clear that the Agent is under a continuing duty to keep the vessel in a reasonable state of repair, another of the principal attributes and responsibilities of one entrusted with the physical operation of a vessel. Respondent argues that this can have no bearing on the issue of employment. Since, however, it has a bearing on the issue as to whether the Agent was the operator of the ship it also has a bearing upon the issue of employment due to the control over the crew exercised by the operator of a vessel and the importance of such control in determining the issue of employment. Even more direct is the relation of responsibility for "maintenance" of the vessel in a proper state of repair to the

question of responsibility for negligence. In this same connection petitioner would again call attention to the language of Article 14 requiring the Agent to "maintain the vessel in a thoroughly efficient state of repair and condition," again making clear an intent to impose a duty continuing at all times.

Article 3A(c). Respondent here calls attention to the fact that although it is provided that the Agent shall "equip, victual, supply and maintain the vessels," it is not provided that the Agent "*man*" the vessels. While such an omission might be significant in the absence of any other contract provisions dealing with the subject of manning the vessels, we submit that it can have no significance here for the reason that this subject is fully covered, albeit with some ambiguity, in the following provision, Article 3A(d).

Article 3A(d). As previously noted, this article provides that the Agent shall "procure" the crew "through the usual channels and in accordance with customary practices of commercial operators . . ." and shall "make available" such crew to the Master "for engagement by him." To paraphrase respondent, we do not see how the English language could make any plainer the fact that such "procurement" of the crew constituted, for all practicable purposes, the "manning" of the vessel.

Aside from the fact that the word "*procure*" usually has an evil connotation (*United States v. Richmond*, 17 F. (2d) 28, 30), as to procure inmates for a house of prostitution (and aside from petitioner's personal feeling that if respondent's construction of Article 3A(d) be sustained, then seamen have been subjected

to prostitution of another kind by being stripped of basic rights) it is at once apparent that this word is synonymous with the word "*obtain*" (*United States v. Somers,* 164 Fed. 259, 262). Thus the term has been defined to mean "to acquire for oneself." See: *Sisk v. Citizens Ins. Co.* (Ind.) 45 N.E. 804, 805; *Homestead Fire Ins. Co. v. Ison* (Va.) 65 S.E. 463, 465; *Cunningham v. Royal Neighbors of America* (S.D.) 124 N.W. 434, 435; *Kadane v. Clark* (Tex.) 134 S.W. (2d) 448, 456, 459.

Thus it is clear that the word "procure," as used in this agreement, has all the attributes necessary to "manning," since by statute the actual "engagement" of the crews by the Master by the signing of the Shipping Articles has always been a separate transaction and such articles have always been between the Master and crew regardless of who is their employer. (See Pet. Op. Br. 24; Pet. First Rep. Br. p. 5.) In this same connection it is also to be noted that the Statement of Policy signed by petitioner's union, while quoting the above provisions of Article 3A(d) relating to the procurement and engagement of crews, goes on not only to provide for a continuation of the employer-employee relationship between companies and crews, as pointed out above (Supra, p. 7), but also goes on to make direct reference to "*established equitable practices and standards in manning,*" thus making clear any doubt that might otherwise remain as to the synonymous meaning of these terms. (Dft. Ex. 25; R. 167-8; offered R. 130.)

Respondent's points, submitted without argument, that the crew is subject only to orders of the Master and that the Master is the agent and employee of the United States, have been covered by petitioner's previ-

ous briefs, in which it has been pointed out that regardless of who is the operator of a ship or the employer of its Master or crew, the crew is always subject to orders of the Master, and that in giving a particular order, the Master may thus be acting as agent for either of one or more persons. (Pet. Op. Br. pp. 29, 33; Pet. First Reply Brief, pp. 7, 8.) If this were not the case there would be a necessary conflict between the provision of Article 3A(d) giving the Master full control and responsibility not only for the navigation but also for the *management* of the vessel and other provisions of the contract imposing duties upon the General Agent with respect to the management of the vessel, even if such provisions be construed as narrowly as urged by respondent.

Furthermore, as also pointed out previously, it is entirely natural during time of war to expect that the Master of a merchant ship may be commissioned as an officer of the United States for the purpose of seeing that necessary wartime orders and regulations are complied with, while leaving the Master free to act also as the agent for the operating steamship companies in discharging its usual duties of operation and those pursuant to the terms of the Agency Agreement. (Pet. First Reply Br. p. 4.) Even in peace-time, as held by this Court, control of a supervisory nature reserved by the government for protection of a governmental program is not incompatible with the retention of the status of a private enterprise. *Buckstaff Bath House Co. v. McKinley,* 308 U.S. 358, 363; *Federal Compress & Warehouse Co. v. McLean,* 291 U.S. 17, 23.

As for respondent's point that the crew was to be paid with funds provided by the United States, that

fact has no more significance in determining the employer relationship than the fact that the employees of many shipyards during the war were also paid with such funds.

With respect to the remaining provisions of the Agency Agreement and respondent's comments thereon (Resp. Br. pp. 10-13), petitioner is content to stand upon its analysis as stated in Petitioner's Opening Brief (pp. 28 to 37) with the following added comments. Petitioner sees no controlling relationship between the contents of the bills of lading and the making of claims for salvage and the question whether the company was the operator of the ship, particularly since the company was to be reimbursed by the government for any losses. Nor does the fact that the Agent had the duty to "arrange for" repairs, subject to government regulations and control, detract from its continuing responsibility for the maintenance of the ship. The fact that steamship companies, like many other corporations, cooperated with the government without assurance as to the *amount* of "fair and reasonable" compensation, as provided by contract, does not mean that they had no assurance of any compensation at all, even if this point be material, which it is not. Nor does the fact that the company was to be indemnified by the government for claims of all kinds mean that the company was not primarily responsible for payment of such claims. Respondent's again repeated argument based upon the inference that the word "business" is a word of limitation has already been answered. The same is true of respondent's rhetorical questions as to why the agreement was not more specific in revealing its true intent, if the parties had such an intent upon these particular problems.

As for the question why the agreement did not "spell out" in more specific terms, the relationship between the crew, on one hand, and the company and War Shipping Administration, on the other (Resp. Br. on Merits, p. 13), the obvious answer is that this agreement was limited to the relationship between the company and the W.S.A. and that the relationship between the crews and these positions was the subject of separate agreements, to-wit: the collective bargaining contracts between the unions and the companies and the Statements of Policy between the unions and the W.S.A. which, at least in the case of petitioner's union, made very clear the intent that the union members continued to be employees of the company. (See supra, p. 7.)

The remaining point raised by respondent under this issue is to the effect that petitioner has not shown that respondent was the operator of the ship. (Resp. Br. on Merits, p. 12.) It may be, as counsel suggests, that undue emphasis has been placed upon the term "operator," since the more specific issue in this case is whether respondent retained sufficient control over the vessel and its crew to be regarded as their employer and to be responsible for the negligence which was the proximate cause of the accident in this case. As to these basic issues we submit that the evidence introduced, not only as to provisions of the Agency Agreement, but other evidence, such as union contracts, the Statements of Policy and other items of evidence discussed herein, amply support petitioner's position that not only did previous employment practices continue, but that the company remained in substantially the same employer relationship with respect to the union representing this petitioner and with its members, including this petitioner, and also amply sup-

ports petitioner's position that not only was physical possession of the ship transferred to the agent, as under previous Agency Agreements, but that the agent, by assuming responsibility for maintenance of the ship and for other aspects of its operation, remained fully responsible for the negligence involved in this case.

But responsibility as the "operator" of the ship of itself and aside from other evidence carries much weight in determining these basic issues, because of the control and responsibility necessarily involved. Petitioner has thus considered it to be of importance to call attention to the evidence that respondent was the operator of this vessel, although petitioner is under no necessary burden to establish this position. In reply to respondent's challenge on this point, however, petitioner would direct attention to the provisions of Articles 5 and 7 which provide for payment of compensation and reimbursement by the W.S.A. to the General Agent to cover all expenses with certain exceptions, including an exception for expenses "*not* directly and exclusively applicable to the maintenance, management, operation or conduct of the business of the vessels hereunder." Conversely, it is thus explicitly provided that the agent shall be either compensated or reimbursed for all expenses connected with the operation of the vessel, which, we submit, carries with it the clear inference that the General Agent is regarded as operator of the vessels, since otherwise such provisions would be utterly meaningless.

Then follows in Article 7, a specific provision for reimbursement for crew expenditures, including wages, overtime, travel expense, bonuses, maintenance, care, compensation for personal injuries, as required by law, custom, ship's articles, labor agreements or by action

of the Maritime War Emergency Board, making further clear beyond doubt the position of the General Agent as the employer of the crew. The provisions of Article 8 for insurance to be carried by the Agent against marine risks, including claims for personal injury, further support this theory of the case, since, again, such provisions would be meaningless and the cost of premiums wasted unless the Agent were regarded as responsible for the operation of the ship.

In further support of this position petitioner would direct attention to express recognition by the Congress on February 3, 1943, that:

> "The vessels owned by the W.S.A. or under bareboat charter to it *are operated* by experienced steamship companies as general agents for the Administrator." (House Report No. 107, 78th Congress, 1st Session at p. 16; 1943 A.M.C. 606 at p. 617.)

Therefore, even though the Agency Agreement may not more expressly designate the agent as the operator, such is the unescapable conclusion to be drawn from its provisions, as analyzed by petitioner above and in preceeding briefs.

2. The Statement of Policy

Respondent under this heading first avows that it is immaterial whether petitioner knew of the terms of the Agency Agreement or not. (Resp. Br. on Merits, p. 14.) While petitioner recognizes that there are the two lower court decisions cited by respondent in support of that position, it is submitted that the case of *Lewis v. U. S. Navigation Co., Inc.*, 57 F. Supp. 652 at 655 lays down the more sound rule in requiring that such knowledge be brought home to the seamen them-

selves. Moreover, as this Court knows, seamen are re garded as special wards of the Court and that in orde for a steamship company to claim a seaman ha signed away his rights it must affirmatively show tha no advantage has been taken and that the action wa taken with full understanding of his rights. *Garrett v Moore-McCormack Lines,* 317 U.S. 239, 246-8. Of mor importance, petitioner submits that there is a necessar corollary to the rule of this Court as established in th *Brady* case, supra, that a private steamship compan cannot by contract with the government escape liabilit to third persons. That corollary is that in order to bin such persons they must either be a party to such con tracts or at least have not only actual knowledge bu understanding of such contract provisions.

Seemingly recognizing the weakness of its position a above stated, respondent thus retreats to the positio that, in any event, petitioner was given notice of th provisions of the Agency Agreement as the result o publication in the Federal Register and quotation o Article 3A(d) in the "Statements of Policy" and th petitioner's union actually agreed in writing to Artic 3A(d). (Resp. Br. on Merits, pp. 15-16.)

Petitioner has already commented upon the wea ness of this argument. (Pet. Op. Br. pp. 42-3.) Mor over, as pointed out above (supra, p. 7), petitioner union removed any doubt that might otherwise ex as to its understanding and intent in signing its Sta ment of Policy by omitting any provision that chang in union contracts should be made by agreement wi the W.S.A., and instead inserting an explicit provisi that all disputes be settled by and between the uni and the steamship operators, showing clearly that

continued to hold such companies responsible under its agreements as employers of the crews.

3. The Shipping Articles

Respondent calls attention to four points with reference to these Articles (Resp. Br. on Merits, p. 18):

a. That they are between the Master (and not the General Agent) and the crew.

Since, however, Shipping Articles have always customarily and by statute been between the Master and crew, regardless of who is the owner or operator this point has no significance. (See Pet. First Reply Br., pp. 4-5.)

b. That the voyage is to be anywhere that the Master may direct or as ordered by the government.

Here again, it is entirely consistent with petitioner's theory that the steamship companies were responsible as operators of the vessels for the government to retain supervisory control as to destination of voyages, particularly in time of war. (See supra, page 14.)

c. That bonus payments, insurance, wages during internment, and certain other specified matters were to be governed by decision of the Maritime War Emergency Board, a government agency.

It is to be noted, however, that basic conditions of employment, such as wages during voyages, overtime, hours of work, etc., were not mentioned, thus being left presumably to be governed by contract between the companies and unions. Moreover, there is nothing any more inconsistent with the employer relationship to

have such matters governed by the decision of such a Board than for non-maritime employers and employees to be governed as to similar matters during time of war by decisions of the National War Labor Board.

d. That the Shipping Articles plainly indicated that the W.S.A. was the owner and that the respondent company was the agent.

Since, however, it is not the fact of agency but the responsibilities of the agent that are of importance in this case, this point is likewise of no significance.

Having thus disposed of the points raised by respondent under this heading, it follows that they add no further support for the conclusions which respondent would draw from the evidence. (Resp. Br. on Merits, p. 19.) In particular, the conclusions that the United States retained full control of the vessel and that Hust was an employee of the government and not of the General Agent are in no way supported by these points.

4. Decisions of Lower Courts

Respondent cites thirteen decisions of lower courts in other cases purporting to sustain its construction of the General Agency Agreement. (Resp. Br. on Merits, p. 20.) Petitioner submits, however, that all of these decisions are clearly distinguishable from the instant case on one or more of the following points:

a. Although the dates of injuries are not stated in all of these cases, most of them involve injuries which apparently occurred after March 24, 1943, the date on which Public Law 17 was enacted, with resultant changes in the rights and remedies of seamen, as dis-

cussed below, and are thus not controlling for injuries occurring prior to that Act. *Walsh's Case,* 1945 A.M.C. 747; *Ferris v. American South African Line,* 1945 A.M.C. 1296; *Williams v. American Foreign S.S. Corp.,* 1946 A.M.C. 98; *Baker v. Moore-McCormack Lines Inc.,* 57 F. Supp. 207; *Steele v. American South African Line,* 62 F. Supp. Adv. Sh. 636; *McInnis v. United States and General S.S. Co.,* 1945 A.M.C. 1039; *Neilsen v. American President Lines,* 1944 A.M.C. 1169; *Pedersen v. Stockard S.S. Co.,* 1945 A.M.C. 23; *Algiere v. Cosmopolitan Shipping Co.,* 1945 A.M.C. 906.

b. Several of the cases arose by way of libels in admiralty in which the controlling test of responsibility is that of ownership of the vessel, rather than that of the employer-employee relationship, as under the Jones Act. *Walsh's Case,* supra; *Ferris v. American South African Lines,* supra; *Conlon v. Hammond S.S. Corp.,* 55 F.S. 635; *Fox v. Alcoa S.S. Co.,* 143 F. (2d) 667.

c. Although respondent has now collected a total of thirteen lower court decisions in other cases, all were from either New York (Southern District or State Supreme Court) or California, except for *Fox v. Alcoa S.S. Co.,* supra, which held only that no suit could be brought against the government except under terms fixed by it. (See cases as cited Resp. Br. on Merits, p. 20.)

d. In most of the cases it does not appear that the Courts had before them more than the language of the General Agency Agreement and Shipping Articles, and in few, if any, of them does it appear that the Courts had before them or considered other evidence of the employer-employee relationship, as in this case, such as union contracts, testimony and other evidence on

points such as payment of wages, and other features pertinent to establishment of the employer-employee relationship.

In this connection it is to be noted that:

(1) The following cases were disposed of on motion, without submission of testimony: *Murray v. American Export Lines,* 53 F. Supp. 861; *Ferris v. American South African Lines,* supra; *Baker v. Moore-McCormack Lines,* supra; *Steele v. American South African Lines,* supra; *McInnis v. United States and General S.S. Co.,* supra; *Fox v. Alcoa S.S. Co.,* supra; *Neilson v. American President Lines,* supra; *Algiere v. Cosmopolitan Shipping Co.,* supra.

(2) In other cases, although decided after trial, there is nothing to show that the Courts considered more than the contract and Shipping Articles, insofar as the issue of employer-employee relationship was concerned.

Petitioner submits that this last distinction is of primary significance for the reason that where, as here, there was evidence outside the agency contract going to the element of the employer-employee relationship and therefore a proper basis for a determination of that question by a jury, a far different situation is presented than from cases in which this question has been decided as a matter of law solely upon the basis of the pleadings or contract language and apart from other evidence or from a jury verdict upon the basis of such evidence. As well established by this Court, such a verdict may not be set aside on appeal if there is any substantial evidence to support the verdict. *Tennant v. Peoria & Pekin Union R. Co.,* 321 U.S. 29, 35. As previously submitted by petitioner, it is again urged

that in this case there was at least such substantial evidence when one considers the Statement of Policy for petitioner's union, the union contracts, and the other evidence as summarized in Petitioner's Opening Brief. (pp. 40 to 47.)

Although it may be true that at the present time respondent may be able to produce more lower court cases, by numerical count, and although petitioner agrees that such decisions are by no means controlling, it is submitted that those in support of petitioner's position are not only better reasoned but more closely in accord with the decisions of this Court, as in the *Brady* case. These lower court decisions largely speak for themselves, and require only the following added comments to correct what petitioner considers to be mistaken impressions arising from respondent's attempts to distinguish some of these cases. (Resp. Br. on Merits, pp. 24-5.)

Petitioner did not submit the case of *Carroll v. United States,* 133 F. (2d) 690, as controlling, but does submit that it has some bearing on this case for the reason that it held that "the libellant was free to sue the Agency," citing the Jones Act as authority. Id. at 693. The case of *Lewis v. United States Navigation Co.,* 57 F. Supp. 652, which respondent says is in its favor, not only awarded damages to the plaintiff, but recognized that seamen must be afforded a full disclosure of any attempt by a steamship company to limit its liability to the crews of ships operated by it. Respondent states that the case of *Gay v. Pope & Talbot, Inc.,* 1944 A.M.C. 855, "recognizes the propriety of the decision in *Murray v. American Export Lines,* supra, which supports us throughout." It is thus interesting to note that the

only reference in the *Gay* case to the *Murray* case is the following statement:

> "But there the plaintiff conceded . . . that both he (the fellow servant) and plaintiff were employed by the United States . . . and the Court did not determine that Public Law 17 created an exclusive remedy." (Id. at 862.)

Thus the *Gay* case holds only that the *Murray* case simply did not have before it either the crucial issue of whether the seaman was an employee of the General Agent or the issue involving the effect of Public Law 17 upon seamen's rights of suit against General Agents.

In addition to the cases cited in Petitioner's Opening Brief two additional cases have a bearing upon the question whether General Agents are responsible as the operator of ships, although not deciding directly that they are to be regarded as the employers of the crews.

In *Quinn v. Southgate Nelson Corp.*, 121 F. (2d) 190 (CCA 2a) an action for death of a bridge tender under a previous form of General Agency Agreement, it was held that powers reserved to the government did not deprive the company of *de facto* control, pointing out that:

> "The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow."

In *Moser v. Standard Oil Co. of New Jersey*, 60 F.S. 6 (E.D. Pa.) it was held that a seaman may recover by an action in Admiralty against a General Agent under

the present form of Agency Agreement for the value of clothing lost upon a vessel, thus directly holding that the Agent was the "operator of the ship" and therefore responsible. In *Bruszewski v. Isthmian S.S. Co.*, 1946 A.M.C. 223 (E.D. Pa.) it was held in an action by a longshoreman that the General Agent was the operator and owner *pro hac vice* of the vessel. After a careful analysis of the same form of General Agency Agreement, it was held that:

> "A studied consideration of the provisions of the General Agency Agreement leaving possession and management of the vessel to the defendant gave it such a substantial measure of control over its operation, that the powers reserved to the United States under it were not such as would deprive the defendant of *de facto* control of the vessel, which it seems to me is the criterion to be adopted in making a determination." (Id. at 226.)

5. Public Law 17 and the Internal Revenue Code

In considering the application of Public Law 17, supra, and Section 1621 of the Internal Revenue Code, supra, to this case petitioner again calls attention to the fact that neither of these statutes was enacted until after the date of the injury in this case and thus can have no bearing upon petitioner's rights. This is a matter to be properly determined by the courts upon the basis of the facts of particular cases, rather than by such general observation in the reports of Congressional committees. It is submitted, however, that even when viewed in this limited light Public Law 17 and Section 1621 and the reports of Congress prior to their passage, present a picture not only involving basic contradictions, but one

at variance with established facts, at least in certain important respects.

These legislative reports clearly recognize that the private steamship companies continue to be the operators of the vessels. House Report No. 107 refers to the vessels as "being operated as merchant ships" (p. 3); to "privately operated" ships (p. 3); to insurance coverage for "agent operators" (p. 5); to "full utilization of the . . . operating technique of established private organizations" (p. 14); to the fact that such vessels "are operated by experienced steamship companies" (p. 16); and to the Agent as "the operator of the vessel" (p. 19). (House Report No. 107, 78th Congress, 1st Session.) Although respondent may endeavor to explain these references as "loose," the fact remains that as such operators the private steamship companies retained a large measure of control not eliminated by the fact that some degree of supervisory control by the War Shipping Administration had been superimposed. In view of the importance of control in determining the employer-employee relationship these facts are of particular significance in determining the liability of General Agents under the Jones Act.

It thus appears as a striking paradox that the Congressional Reports should speak in the same breath of merchant seamen as employees of the United States. It may well be argued that this use of the term was equally "loose." Thus added significance must be attached to the reference in both House and Senate reports to the fact that such seamen are only "technically" government employees (House Report No. 107, supra, p. 22; Senate Report No. 62, 78th Congress, 1st Session, p. 5).

Had such seamen become regular government employees in all respects they would, at least prior to Public Law 17, have been entitled to the benefits of the United States Employees Compensation Act (5 U.S.C.A. §751ff) and the Civil Service Retirement Act (5 U.S.C.A. §691ff). The fact that they had been denied the benefits of both of these statutes shows that they were not regarded exclusively as government employees. (See House Report No. 107, supra, p. 2.) On the other hand, at least in many cases (and in this case, as shown below, p. 33) deductions were made under the Social Security Act (42 U.S.C.A. §301ff) for old age and survivor benefits, from the wages of such seamen even prior to Public Law 17, showing that they were still private employees of agent operators, since otherwise such deductions could not have been made. (See House Report No. 107, p. 20.)

It was also conceded by both House and Senate that the W.S.A. had intended, but had not been completely able, to carry out a policy of maintaining *in toto* the peacetime status of seamen relating to compensation for injuries and that seamen were entitled to have such rights maintained. (H. R. 107, supra, p. 15; S. R. 62, supra, p. 5.)

In making a determination of seamen's rights under the Jones Act for the period prior to enactment of Public Law 17 and, in particular, of petitioner's rights in this case, it is submitted that this Court should give primary consideration to the facts of this particular case, including the evidence of control and other features of the employer-employee relationship, and that in considering such facts this Court should bear in mind the following:

a. That seamen have always been regarded as special wards of the Court.

b. That during the war merchant seamen were exposed to great risks, both marine and war risks, and are entitled to have all of their rights preserved.

c. That it is entirely possible for a person to be employed by two employers at the same time but for different purposes.

d. That always in the past seamen were employees of the General Agents.

e. That under the *Brady* case this relationship could be changed only by:

(1) Clear and unambiguous legislation, not present in this case, at least prior to Public Law No. 17, or

(2) Contracts to which seamen were either parties or were given a full understanding of their rights.

f. That under the Statement of Policy signed by petitioner's union it was made clear that the union members retained *all* contractual rights against the private steamship lines.

g. That the right of trial by jury has always been regarded as "part and parcel" of seamen's rights under the Employers Liability Act and Jones Act. *Bailey v. Central Vermont Railway, Inc.*, 319 U.S. 350, 354, and that reference to the "modification" of this right by Public Law No. 17 (House Report No. 107, p. 21), makes clear that it continued to exist at least up to the enactment of that statute.

COMMENTS ON RESPONDENT'S REMARKS UPON PETITIONER'S BRIEF

1. The Brady Case. (Resp. Br. on Merits, p. 33.)

Respondent again attacks this case as "different from the present case in almost every respect." Petitioner submits that there can be no escape from the application to this case of the two basic principles established by this Court in the *Brady* case, supra, at 581 and 583, and referred to so frequently by petitioner as to make further quotation unnecessary. (See Pet. First Reply Br., p. 9.)

2. Petitioner's Claim That the Agent Was the Operator. (Resp. Br. on Merits, p. 34.)

This claim has been so fully documented above and and in previous briefs as to require no further elaboration to meet respondent's attempted denial. (Pet. Op. Br., pp. 28-32, 51-53; Pet. First Reply Br., p. 3; supra, pp. 11 to 18, 25 to 27.)

3. National War Labor Board and National Labor Relations Board Cases. (Resp. Br. on Merits, p. 36.)

As previously pointed out, the two principal federal war-time agencies with jurisdiction over labor problems apparently joined in the conclusion that under General Agency Agreements the companies continued to be employers of the crews. Respondent's sole argument on this point is to expand somewhat the argument in its brief in opposition to the petition (p. 11) to the effect that the relationship of employer and employee before the National War Labor Board and National Labor Relations Board is *sui generis* and has nothing

to do with the "conventional" or "natural" relationship required under the Jones Act, citing *N.L.R.B. v. Hearst*, 322 U.S. 111. This conclusion is, we submit, wholly without foundation, for the reasons stated in Petitioner's First Reply Brief (pp. 10-11). In addition to War Labor Board decisions previously cited petitioner would also call attention to the case of *In re Maritime Cases*, Case No. 111-16640-D et al, 17 L.R.R. 39, decided Aug. 31, 1945, to which proceedings this petitioner was a party.

4. Collective Bargaining Agreements. (Resp. Br. on Merits, p. 37.)

Petitioner has pointed out that not only were the collective bargaining agreements previously existing between the steamship operators and unions "frozen" for the duration of the war but that after the present General Agency Agreement of April 4, 1942, the companies and unions continued to negotiate further agreements. (Pet. Op. Br., pp. 40-43.) Respondent argues that the inclusion in the Statements of Policy of Article 3A(d) "completely negatives" the contention that these facts are further evidence of a continuation of the employer-employee relationship previously existing between the parties. Not only does this argument completely beg the question by assuming the correctness of respondent's construction of Article 3A(d), but in addition, as pointed out above (supra, p. 7), the Statement of Policy for petitioner's union omitted any provision that future changes in union contracts were to be made by agreement with the W.S.A., but specifically provided that all future disputes be handled through the regular and existing machinery under union agreements between companies and unions. (See R.

168.) That such was actually done is proved beyond doubt by supplemental agreements negotiated between the companies and union (See Ex. 15, pp. 35 and 64; offered R. 114, by agreement of counsel not printed, but remaining as part of the record, R. 177). In addition, later union agreements arising from cases decided by directive order of the National War Labor Board in which the steamship companies and unions were the sole parties provided, among other things, that the right of discharge by the general agents should not be impaired (Sec. 3 of directive order); spoke of recognition by the operators of the union "as the representatives of *their* licensed engine room officers for purposes of collective bargaining" (Sec. 1(a)); and provided for insurance to protect the general agent. (Sec. 4.) *Atlantic & Gulf Coast Agents and Pacific American Assn.*, 16 W.L.R. 24, Case No. 111-4932-D. Thus petitioner maintains the correctness of his previous position that there was nothing in the Statement of Policy signed by his union to indicate that the W.S.A. was to be substituted for the companies as the employer under the union contract.

These same facts also constitute an answer to respondent's suggestion that only wages and working conditions were frozen, with the inference that other contract rights were not continued. Moreover, the testimony of Mr. Warwick, relied on by respondent, speaks not only of freezing wages and working conditions, but of "collective bargaining agreements," indicating again that *all* contract rights were to be continued. (R. 102, 103.) The same is made clear by the letter from Edward Macauley, Assistant to the Administrator, of the W.S.A. to Joseph Curran, President, National Maritime Union of America. (Dft. Ex. 25; R. 169-170; offered R. 130.)

5. Payment of Wages—Deduction for Social Security Taxes. (Resp. Br. on Merits, p. 39.)

The only point under this heading requiring further comment is respondent's statement that deductions for social security taxes show nothing because the company was merely acting as agent for the government under provisions of the agreement requiring it to pay the crew in the customary manner, subject to reimbursement by the government.

If, however, crew members were employees of the government, as urged by respondent, no such deductions could have been legally made, since the Social Security Act (42 U.S.C. Sec. 301 ff.; 49 Stat. 620 ff), specifically provides that government employees are not subject to its provisions. (Sec. 1011(b)(6).) In this connection it is to be noted that under Article 7 of the Agency Agreement it is provided that the agent shall be reimbursed for any social security taxes which the agent is or may be required to pay on behalf of the crew to complete the payments into the Social Security fund. (R. 156.) Since, however, there could be no legal disbursement or deduction by the W.S.A. for social security taxes upon its own employees, the act of making deductions for social security taxes shows a construction by the agent itself of Article 7 and a recognition that it is the employer of the crew. See *Buckstaff Bath House Co. v. McKinley,* 308 U.S. 358, 363.

6. Crew Pass and Muster Cards. (Resp. Br. on Merits, p. 40.)

Respondent would draw the inference that the reason why these cards, as well as the pay envelopes, have

the name of the company was that they were probably accumulated stationery. This, however, was an inference which only the jury was competent to draw and it reached a contrary conclusion on the employer-employee issue, based on all of the evidence.

7. **Withholding Tax Forms.** (Resp. Br. on Merits, p. 40.)

No further comments. (See Pet. Op. Br. p. 45.)

8. **Correspondence Between Company and W.S.A. and with Petitioner.** (Resp. Br. on Merits, pp. 41-2.)

Petitioner submits that respondent's argument on this point is fully answered in Petitioner's Opening Brief (pp. 45-7) and would add only one further comment. After respondent and the W.S.A. had exchanged correspondence (which petitioner submits as evidence of a construction by the parties of the General Agency Agreement that it was intended for the agent to assume liability for all marine risks, including the accident in question) the respondent wrote to petitioner, inclosing a copy of the W.S.A. letter, and requested that he submit the amount of his claim to the company so that it could discuss the matter with its underwriters. (Ptf. Ex. 17; R. 145; offered, R. 129.)

Thus respondent not only again failed to notify petitioner of its position that he was an employee of the W.S.A. and that his sole remedy was against the government (See *Lewis* case, supra), but by requesting him to submit his claim to the company thereby represented to petitioner that it had assumed responsibility for his claim. Under respondent's present theory

of the case, no suit could be filed until the claim was "administratively disallowed." (Resp. Br. on Merits, p. 27.) The only regulations for the filing of such claims with the W.S.A. for approval or disallowance do not provide that they may be filed with the general agents, but require that they be filed with the Chief Adjuster of the W.S.A. in New York City. (General Order 32, Section 304.25, 8 Fed. Reg. No. 81, p. 5414, issued April 22, 1943.) Thus the request of respondent that petitioner submit his claim to the company can only be construed as an admission that it was the responsible party.

EVIDENCE OF NEGLIGENCE

Respondent's arguments on this issue are substantially the same as made in respondent's brief in opposition to the petition (pp. 8-10), and are thus fully answered in petitioner's first reply brief (pp. 6-8).

CONCLUSION

Respondent's final request, after urging that the evidence is so overwhelming as to justify setting aside the jury verdict, is to ask again that its duties and responsibilities be determined in accordance with the Agency Agreement. (Resp. Br. on Merits, pp. 46-7.)

As for the weight and sufficiency of the evidence, petitioner can only repeat that a competent jury has rendered a verdict for plaintiff after answering in the affirmative a specific interrogatory going to the existence of the employer-employee relationship (R. 137). Petitioner also again submits that the record of this case and the evidence as discussed in petitioner's briefs, including not only provisions of the Agency Agreement, but those of the Statement of Policy for petitioner's

union, and the collective bargaining agreements, as well as the evidence concerning payment of wages, employment practices and correspondence regarding liability, when combined with an absence of any showing by respondent, outside of the Agency Agreement, of any actual changes in employment or operating practices, constitutes more than substantial evidence to support this verdict.

As for the Agency Agreement itself, crewmen are nowhere described as employees of the government and the express designation of the Master as such an employee, when considered in the light of the principle of *expressio unius est exclusio alterius* and provisions for a continuance of customary employment practices for the crews shows that there was no such intent. On the other hand, the agreement provides clearly that physical possession and custody of the vessel was transferred to the general agent and, as demonstrated by petitioner, provides also that the agent is not to be a mere dock-side bookkeeper, as respondent would contend, but was to assume responsibility for the management, maintenance and operation of the vessel and, as such, was responsible as employer of its crew as well as for negligence in its operation.

Even if it be conceded that there be any doubt as to these conclusions, which petitioner most emphatically denies, it is submitted again that this Court should resolve any such doubt in favor of the rights of this seaman in view of the principles of the *Brady* and *Lewis* cases to the effect that basic rights of seamen cannot be destroyed by agreement between steamship companies and the government, at least without full notice to and understanding by the seamen involved, and in view of

the historic position of merchant seamen as wards of the Courts and of the recognized basic right of trial by jury of which all seamen similarly situated would be deprived if respondent's position be sustained in this case.

The decision of the Oregon Supreme Court should be reversed, thereby affirming the decision of the trial judge and jury in this case.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 625

CECIL I. HUST,

Petitioner,

vs.

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF AFTER ORAL ARGUMENT

ABRAHAM E. FREEDMAN,
B. A. GREEN,
EDWIN D. HICKS,
Counsel for Petitioner.

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PETITIONER'S REPLY BRIEF AFTER ORAL ARGUMENT

We do not understand the first question as framed by the respondent to accurately reflect the issue raised at the oral argument. The question as raised by the respondent is, does the War Shipping Administration have authority to operate the vessels and to enter into the General Agency Agreements for the operation of those vessels? The respondent then proceeds to analyze the Merchant Marine Act of 1936, as well as the subsequent acts in urging that there was such authority on the part of the War Shipping Administration. As we understand the question put by the Court, the Court first pointed out the provisions of the Act of 1936 which gave certain rights and expressly preserved the rights of seamen under the existing law, and then the Court wanted to know whether there has been any act sub-

sequent to the 1936 Act which superseded that Act or modified it in such a way as to give the War Shipping Administration greater powers, and particularly, powers on the basis of which the existing seamen's rights could be impaired. While this may not be the phraseology employed by the Court, we think this is the general purport of the Court's question.

It will be noted from the Executive Order (9054) which is so strongly relied upon by the respondent that the Government intended primarily to transfer the functions of the United States Maritime Commission to the War Shipping Administration, and it will be noted further that this was intended to permit the War Shipping Administration to "control" the operation of the merchant vessels. Thus the War Shipping Administration was merely substituted for the United States Maritime Commission, and it may be stated that the latter Acts did not in any material respect supersede or nullify any of the provisions of the 1936 Act, at least so far as the issues are here concerned.

To direct ourselves to the question raised by the Court as we understand it, we think it is fair to state that there has been no change in the subsequent legislation which would impair the rights which were expressly reserved to the seamen under the 1936 Act (46 U. S. C. A. 1128(f)). As will be pointed out briefly hereafter in connection with the following point, the only statute which the respondent seizes upon to support its position is Public Law 17. We submit that that Act has absolutely no bearing on the issue before the Court. Suffice it to say with respect to the first point, therefore, that neither the 1942 Act nor any of the other Acts required any change in the operation of the vessels as they had theretofore been operated under the 1936 Act. Under the latter enactment, the vessels were operated through general agents as in the *Brady* case, and there is no language to sustain any suggestion that the War Shipping Adminis-

tration was intended to itself operate the vessels under the later legislation in any different manner than under the prior procedure. In any event, there is no provision which expressly or even inferentially impairs the existing rights of the seamen which were expressly preserved under the 1936 Act.

The next argument taken up by the respondent involves the applicability of Public Law 17 to the issues at bar. It is suggested that under that Act the seamen could only be considered as Government employees and are not entitled to a jury trial in any respect. It is urged from that premise that there can be no right of action against the general agent. We submit that this contention cannot stand analysis.

In outlining the provisions of P. L. 17, respondent admits that this Act did not change any of the existing rights; that all that it did was to extend the same rights of seamen on merchant vessels of the United States to seamen on public vessels of the United States and to require administrative disallowance of any claim before the filing of a suit in order to prevent unnecessary or premature litigation against the United States. To begin with, a reference to the Act discloses that at the very outset (50 U. S. C. A. app. 1291) the members of the crews employed on vessels as employees of the United States shall have all of the rights and benefits applicable to seamen employed on privately owned and operated vessels. Before going further, we may state that this clause added nothing to the existing law since under the Suits in Admiralty Act (46 U. S. C. A. 742) any member of the crew could proceed against the United States by a Libel in Admiralty with the same rights and privileges which were accorded to any member of the crew of a privately owned or operated vessel.

Perhaps the most important provision of P. L. 17 follows the clause above set forth and provides that these sea-

men, because of the temporary wartime character of their employment, shall not be considered as employees of the United States for the purposes of the Employees Compensation Act, the Civil Service Retirement Act and certain other enumerated benefits accorded to Federal employees. The most searching scrutiny of P. L. 17 fails to disclose any provision which attempts to regulate or which refers in any way to the relationship between the seamen and the general agents or operators. It is clear beyond doubt that P. L. 17 was intended only to regulate those suits which could be brought against the United States. The liability of a general agent had already been determined by the decision in the *Brady* case before the enactment of P. L. 17, and it may be assumed that Congress was fully aware of the liability of a general agent irrespective of the liability of the United States. The public hearings which have been frequently referred to show that the legislators were fully cognizant of the agents' liability. It is, therefore, reasonable to infer that if Congress intended to nullify or otherwise modify the liability of the general agent, it would have expressly made such provision in the Act. As Mr. Justice Douglas pointed out in the opinion in the *Brady* case, if Congress had intended to restrict the seamen's rights against the general agent, it would have said so in clear and unambiguous terms. The fact that Congress made no mention of the general operators' liability shows that the Act was not intended to affect the general agent's liability.

The next argument taken up by respondent is indeed interesting. It is stated: "Since the shipping articles are statutory in form and are always signed between Master and crew, why is it significant that they were so signed in this case?" Respondent, in its original brief, argued that because the contract in this case was signed between the Master and the crew that the crew must, therefore, be

considered as employees of the United States inasmuch as the Master was himself considered an employee of the United States. It was not until we pointed out that the shipping articles which were entered into by the Master were statutory in form and were always so required to be executed that the respondent's argument then lost all its force. We submit that it is because of that fact that the respondent now seeks to minimize the importance of the statutory articles. In this same connection, the sweeping statement is made that the Master, in engaging the seamen, has always acted for the "owner" of the ship, but significantly, no authority is cited in support. The authority, we submit, is to the contrary as in *Bacarrat* v. *Mahoney*, 1933 A. M. C. 1652, where the Court said that so far as third persons are concerned, the Master is considered the agent of the operator and not the owner.

Respondent continues with a discussion of the criteria which characterizes an owner pro hac vice. We submit that the very authorities cited fail to sustain respondent's position. We shall not burden the Court with repetition of the argument which we have already made in our prior brief. It need only be added that an examination of the cases cited do not place the same emphasis and interpretation on the terms as is set forth by the respondent. So far as the actual navigation of the ship is concerned, no owner or operator could ever interfere with the Master of a vessel, either in the navigation or in the management of the internal affairs of the vessel. It is essential only to show that the operator has the constructive possession of the vessel and the management of the vessel's business in order to fall within the category of an owner pro hac vice. Nor is there anything inconsistent in the suggestion that there can be more than one operator or owner pro hac vice who would be liable for the same things arising out of the operation of the vessel. As a matter of fact, the opinion

in the *Brady* case points out that very fact and states that the seaman had a dual remedy, one against the United States and the other against the agent, because of the substantial control which it exercised over the vessel's management. Whatever might be the liability of the United States, that fact cannot operate in mitigation of the general agent's liability, if the latter in fact exercised any substantial control over the management and operation of the vessel. While we shall not undertake to answer categorically each and every statement of the respondent, there are several which cannot go unchallenged. It is stated on page 32 of the respondent's Brief that the agent cannot select the Master; that all it can do is to produce him for the United States to pass on and reject or accept. This is certainly not substantiated by the facts or by an analysis of the agreement itself. On the contrary, it is the general agent who actually does engage the Master, and it is subject only to the approval of the War Shipping Administration. The latter at no time undertakes to accept or reject in the sense suggested by the respondent. It can even be stated from the terms of the contract itself that the agent is free at any time to "hire and fire" a Master and only the hiring must be subject to the approval of the War Shipping Administration. The contract, as well as the actual testimony, leaves no room for doubt but that the general agent is responsible to the War Shipping Administration for the engagement of the proper personnel. It is the general agent who must actively engage in the procuring of the crew in the same manner that it has always done. In this connection, it is relevant also to point out (Exhibits 14, 15, 18, 19, 20) that the general agents negotiated with the Unions for the engagement of these crews under union agreements between those general agents and the unions. The Statement of Policy (R. p. 167) reserves the right to bargain with the agents under the regular machinery. Perhaps one

of the most significant factors is the result of the investigation by the National Labor Relations Board in the case of *Barge Carriers, Inc.* v. *Atlantic and Gulf District of the Seafarers' International Union of North America*, Case No. 10-C-1382, where the status of a general agent was thoroughly investigated, and after careful deliberation, it was held that the general agent is the real employer of these men, and the general agent actually operates the vessels under only nominal supervision of the United States. Here is an impartial agency which holds a general agent accountable as an employer for the purpose of the National Labor Relations Act. We think that decision goes further than the Court need go in this case, but that decision clearly proves that from the actual and practical standpoint, and in the light of the existing agreement, it is the general agent who is the real party in interest so far as the operation of these vessels is concerned. At this point, it is also relevant to direct the Court's attention to the respondent's discussion concerning the compensation of the general agent. In attempting to explain some of the more substantial payments which are made to the general agent, in addition to compensation for other services, the respondent states: "These General Orders 12 and 34 will be easier to understand if it is realized that the general agents and the agents' duties were to 'husband' the ship." Apparently respondent has completely overlooked the significance of the "husbanding" of a vessel. As the Court will find from an analysis of the cases already set forth, that expression implies a relationship to the vessel which goes along with ownership or with operation as owner pro hac vice.

Respondent's fourth point attempts to distinguish between the duties of an owner during peacetime and an agent under the present contract. We submit that the analysis does not undertake to develop the true criteria which characterize an owner pro hac vice. An owner pro

hac vice could well be substituted for the agent in the analysis drawn by the respondent and he must still be held accountable for the liabilities of an operating owner. This is aside of the fact that several of the statements are not strictly accurate. As for example, the agent does have the right to make repairs to the vessel; he does have the right to equip, victual, supply and maintain the vessel; he does "man" the vessel in the same manner that he did before. The statement that the agent has no authority to give instructions to the Master is contrary to the fact. It may be stated that it is the agent who gives the instructions to the Master, and where the War Shipping Administration desires to issue any instructions, they do so through the agent. It may be stated in this connection, however, that the function of the War Shipping Administration is not to issue instructions, but rather to approve the instructions which are issued by the agent. Bills of lading, while they may be on behalf of the United States, are contracted for and entered into by the agent; while the War Shipping Administration provides War Risk Insurance, it is the agent who places the P. & I. Insurance with the private companies as in the case at bar. The statement that the agent cannot limit his liability is similarly erroneous, particularly in view of the Act of Congress which expressly confers upon the agents the right to limit liability (50 U. S. C. A. 1294). However, as we have stated, none of the things which have been pointed out by the respondent are material factors in connection with the operation of the vessel and which have always been considered as the controlling factors in the determination of an operator's status as an owner pro hac vice. The failure of the respondent to touch on these important factors clearly evidences that the respondent was unable to meet the real issue.

The discussion with respect to the provisions which absolve the general agent from just such claims as are involved at bar, namely, damages, wages and maintenance and cure, likewise fails to answer the query on this point raised by the Court. We submit that the fact that the reference appears in several places in the General Agency Agreement and the language so painstakingly indemnifies the general agent for liability on account of damages and maintenance and cure that the only reasonable inference is both the Government and the general agent expected that the general agent would be sued for these very items and provision accordingly was made to cover the agent's liability by insurance.

Finally, in discussing the Brief filed as Amicus Curiae on behalf of the Masters, Mates and Pilots et al., respondent interprets certain language to mean that the seaman's right to sue is based upon his employment relationship to the owner and the owner is liable only because he is an employer of the seaman. This interpretation does not correctly represent our view. We have expressly stated in the prior Brief that the liability arises out of the operation of the vessel itself and all those who exercise substantial control over the operation of the vessel thereby incur the liability of an operator-owner. Thus, in *Armit* v. *Loveland*, 115 F. 2d 308, there were several defendants, each of whom were shown to have some substantial part in the operation of the vessel, although the employment relationship is established as between only one. The Court held all of the defendants liable upon the ground that they were all involved in the operation of the vessel. It is not our position that these seamen are not employees of the general agent. On the contrary, we have always maintained that they must be considered as employees of the general agent, irrespective of their relationship to the United States. As we have

pointed out, the National Labor Relations Board similarly so found in the *Barge Carriers* case. The shipping articles themselves bear the name of the general agent as well as the name of the United States in connection with the engagement of the crew. All factors tend to show, particularly from the practical standpoint, that it was the general agent who was the real employer of these men. But notwithstanding the fact that the employment relationship may nevertheless be involved, the liability arises because of the agent's operation of the vessel.

As Mr. Justice Douglas pointed out in the *Brady* case, the seaman has two strings to his bow, one as against the United States and the other as against the general agent. These rights are cumulative and entirely consistent. If Congress had intended to nullify the liability of the general agent, we submit that it would have so stated in clear and unambiguous terms. The fact that it did not do so was in effect an implied expression of approval of the Brady decision.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1945

No. 625

CECIL I. HUST, *Petitioner and Plaintiff-Respondent below,*

v.

MOORE-McCORMACK LINES, INC., *Respondent and Defendant-Appellant below.*

BRIEF OF RESPONDENT MOORE-McCORMACK LINES, INC. IN OPPOSITION TO THE PETITION

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MOORE-McCORMACK LINES, INC., *Respondent and Defendant-Appellant below.*

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

To the Honorable Supreme Court of the United States:

Respondent, Moore-McCormack Lines, Inc., presents this brief in opposition to the petition for the writ.

OPINION OF OREGON SUPREME COURT

The Oregon Court's opinion is reported in 158 Pac. 2d, at page 275. It is so searching, covering as it does every phase of the case, and is so logical, that it leaves

little more to be said. That opinion is a complete justification of the judgment.

It contains, however, one sentence from which we must dissent:—

> "From this review of pertinent decisions it is apparent that there is no decided weight of authority on this important question, which ultimately must be determined by the Supreme Court of the United States." R. p. 37.

This suggests a substantial Federal question. We therefore pass to a consideration of that.

IS THERE A SUBSTANTIAL FEDERAL QUESTION?

In a sense, we have here merely a question of *fact*: Was petitioner an employee of respondent?

Let us expand that thought briefly:

In a Jones Act case, the relationship of employee and employer must exist; and it must be the "natural", "conventional" relationship as understood at common law. *Robinson v. Baltimore & Ohio R. R. Co.*, 237 U. S. 84; 59 L. Ed. 849; *Hull v. Philadelphia Reading Ry. Co.* 252 U.S. 475; 64 L. Ed. 670. That much being understood, it became merely a question of fact to determine whether petitioner, Hust, was an employee of respondent or not. And the Oregon Supreme Court properly held that there was nothing in the evidence to show that he occupied that posi-

tion; but that, on the contrary, it plainly appeared that he did not.

Let us concede that the Oregon Court decided this as a matter of law, arising under the Jones Act. But does this present a Federal question calling for the interposition of this Honorable Court? To do so, it must be "a federal question of *substance* not theretofore determined by this court", or decided "in a way probably not in accord with applicable decisions of this court." Rule 38, Paragraph 5.

The question of employment has already been "determined by this Court" in the Robinson and Hull cases, supra; and that Hust was not employed by respondent was decided in accord with those many "applicable decisions" which hold that where only one conclusion can be drawn from the evidence, the court should direct a verdict.

New Orleans & N.E.R. Co. v. Harris, 247 U.S. 367, 371-372; 62 L. Ed. 1167, 1171.
Chicago M. & St. P.R. Co. v. Coogan, 271 U.S. 472, 478; 70 L. Ed. 1041, 1045.
Gulf M. & N.R. Co. v. Wells, 275 U. S. 455, 459; 72 L. Ed. 370, 372.
Herron v. So. Pac. Co. 283 U.S. 91, 95-6; 75 L. Ed. 857, 861.
Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 343-4; 77 L. Ed. 819, 824-5.

Therefore, there is no federal question of substance here.

This leads us logically to a consideration of the evidence upon which the Oregon Supreme Court based its decision.

EVIDENCE SUPPORTING DECISION OF THE OREGON SUPREME COURT

The respondent, Moore-McCormack Lines, Inc., was appointed by the War Shipping Administration as an agent to manage the "business" of the vessel "MARK HANNA". Def. Ex. 21. R. 149, (offered, 116). Cf. Def. Ex. 27, R. Page 174, (offered, 131). Its duties were outlined and limited in a printed contract between the War Shipping Administration and the Agent, known as GAA 4-4-42. Def. Ex. 21. R. Page 149, 150, (offered, 116). Briefly, it may be said that the duties of the Agent under that agreement pertained to the "business" of the vessel, i. e., procuring crews and making them available for engagement by the Master, attending to cargoes, collecting and disbursing moneys on behalf of the United States, and accounting to the United States. The physical operation of the ship was not a duty of the Agent, but remained with the War Shipping Administration.

In that agreement it was expressly provided that the Master of the vessel should be "an agent and employee of the United States," and should "have and exercise full control, responsibility and authority

with respect to the navigation and management of the vessel."; and that the officers and members of the crew should be "subject only to the orders of the Master."

Perhaps we had better quote the pertinent paragraph in full: R. Pages 151-152.

> "(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

Not only was this Service Agreement, as it is called, published in full in the "Federal Register," R. 131, Cf. also R. 173, 174, thus constituting notice of its contents to all the world, including petitioner, but the particular paragraph just quoted was embodied in a special agreement between the War Shipping Administration and petitioner's union, in a signed document called a "Statement of Policy." Def. Ex. 25;

especially that part at R. Page 167-168, (offered, 130).

Thus Hust's own collective bargaining agent not only knew of this paragraph in the agreement, but expressly agreed to it; and if there is any thing at all to "collective bargaining," that knowledge and agreement must be imputed to him. (Not that this would be necessary, Murray v. American Export Lines, 53 Fed. Supp. 861, 863, but it is nevertheless the fact).

Petitioner Hust signed the usual Shipping Articles. Plaintiff's Exhibit 13. R. Page 142-143, (offered, 92). These were between the Master and Hust:

"IT IS AGREED between the Master and seamen, or mariners, of the SS 'MARK HANNA' ", etc., and then comes the agreement, followed by the signatures of the crew, including Hust. The respondent is not a party to the agreement; in fact, its name nowhere appears, except as the address of the Master and in the "block" near the head of the Articles, where are these words:

"War Shipping Administration (Owner)
Moore-McCormack Lines, Inc. (General Agents)"

It is obvious,we think, that since the contract of employment, the Articles, was between the Master and Hust, and since the Master was the employee of the United States, and the crew were subject "only" to his orders, and were paid "in the customary manner with funds provided by the United States," Hust

was employed by the Master for and on behalf of the United States, and no one else.

This in itself should be enough to dispose of the case, but if more were needed, it would be found in the laws of Congress itself. For example, in the Internal Revenue Code, §1621 (a) (9), it says: "For the purpose of Paragraph (8) services performed .... *on or in connection with any vessel as an employee of the United States employed through the War Shipping Administration,* shall not constitute services performed outside the United States." And of course Public Law 17, 78th Congress, §1, (1943 A.M.C. Page 594) specifically refers to seamen, like Hust, as "employees of the United States through the War Shipping Administration" and expressly classifies them as such, and declares that their remedy for injuries shall be enforced under the Suits in Admiralty Act. The House Report 107, accompanying this legislation, is replete with references to these seamen as employees of the United States, and explains that, if injured, they will still retain their rights under the Jones Act, with one modification, viz., that their procedural remedy will be against the United States under the Suits in Admiralty Act. This Report may be found in 1943 A.M.C. Page 606.

Of course Public Law 17 was passed subsequent to this accident, but it is merely a clarifying piece of legislation and shows, as clearly as if it had been passed before, the Congressional intent with regard to these seamen.

We think we have said enough to establish the status of Hust as an employee of the United States, and not of this respondent, and shall therefore pass to another phase of the case.

NO EVIDENCE OF ANY NEGLIGENCE OF RESPONDENT

Entirely aside from the Jones Act, the judgment of the Oregon Court is correct because there is no evidence whatever of any negligence on the part of respondent.

The only possible causes of the accident which the jury could have found were:

(a) A burnt out light bulb.

(b) Absence of the guard-chain around the hatch.

(c) Ordering plaintiff into the dark, unguarded place thus created.

All of these things were responsibilities of the Master, "an agent and employee of the United States," who had "full control" over them; and the respondent had nothing to do with them whatever.

We merely review the essential facts briefly:

1. It was a government ship—not respondent's. Respondent had no physical control of it.

2. Neither Master nor crew were employees of respondent.

3. The Master was "an agent and employee of the United States," and had and exercised "full control, responsibility and authority with respect to the navigation and management of the vessel." And the officers and members of the crew were "subject only to the orders of the Master." (The Service Agreement, Defendant's Exhibit 21, R. 149, 150, 151, (offered, 116).

4. The bulb light was a part of the management of the ship—solely under the Captain's control. When it failed, another was immediately available. The ship was well supplied. There was merely a temporary failure in the *use* of its facilities; by the men responsible therefor—the Captain and his officers.

5. The same may be said of the guard-chain. It was removed by the Captain's own orders a day or two before the accident. R. 106. For some temporary use in connection with the towage. R. 83-84. Suitable rope was "readily" "available," which could have been placed on the stanchions around the hatch, as a substitute guard. R. 106. But the Captain did not have this done, until immediately after the accident, when he personally ordered it. R. 80.

6. As to the order to Hust to go into the hatch, certainly nothing need be said to show respondent's aloofness from it. "The officers and members of the crew shall be subject only to the orders of the

Master." (Def's. Ex. 21, R. at 151). And it is a fact that the order to Hust was given by the Boatswain in the presence and under the authority of the Master. R. 56.

No more need be said to show the complete lack of any evidence connecting respondent with the accident.

"It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding."

Chicago M. & St. P. R. Co. v. Coogan, 271 U.S. 472, 478; 70 L. Ed. 1041, 1045.

SOME FURTHER REMARKS UPON THE PETITION AND BRIEF

We shall now comment briefly on some of petitioner's further contentions.

1. It is suggested in the petition that respondent is claiming an *immunity* under the Jones Act, and that for this reason this court should take jurisdiction. Of course we are not claiming any immunity at all. We are simply claiming that petitioner has not brought himself within the provisions of the Jones Act.

2. Much reliance is placed on the Brady case. We have never understood why. In no respect is it like

the present case. It was not under the Jones Act. The injured man was a customs inspector, not a member of the crew. The Agency Agreement there involved was different from the one in the present case. The only question presented was whether the Suits in Admiralty Act protected an agent from being sued for his own torts. As Mr. Justice Douglas said: "The sole question here is whether the Suits in Admiralty Act makes private operators such as respondent nonsuable for their own torts." 317 U. S. at Page 577; 87 L. Ed. at Page 475.

3. On Pages 38 and 39 of petitioner's brief he cites certain decisions of the National War Labor Board and the National Labor Relations Board to support his contention that Hust was an employee of respondent. But it has been expressly held by this Court that in cases before such boards the terms "employee" and "employer" are understood in a sense peculiar to such proceedings, and not in the conventional sense necessary to an action under the Jones Act. National Labor Relations Board v. Hearst Publications, 322 U. S. 111; 88 L. Ed. 1170.

4. On Pages 40 and 41 of petitioner's brief it is suggested that the collective bargaining agreements between respondent and the unions, in which respondent is named as one of the "employers" is evidence that the respondent occupied that position in the case of Hust. This overlooks the fact that the respondent, at the time these agreements were originally made, was operating ships of its own, and, as to

them, actually *was* an employer, and the War Shipping Administration merely adopted these agreements for the purposes of its own ships, but modified them, insofar as employment was concerned, by the "Statement of Policy," in which, by agreement with the unions, it was expressly agreed that in accordance with Article 3A(d) of the Service Agreement the master should be the employee of the United States, and should engage the crews, who would be subject only to his orders, and that the management and navigation of the ship should be solely under him.

(It is worth noting that the Service Agreement itself, in Article 15, recognizes that the Agent has other ships of its own, beside those assigned to it under the Agreement. R. 160).

5. Various other items of so-called "evidence" are referred to on Pages 44 to 48 of the petitioner's brief. They seem to us too slight to notice, and are adequately disposed of in the Oregon Supreme Court's opinion. As to the withholding tax forms, on which respondent's name appears as employer, this was strictly in accordance with the tax laws which require that the person who disburses funds as wages, even though not for his own account, is to be regarded, for the purposes of the tax act, as an employer.

The correspondence between the War Shipping Administration and respondent, regarding the reference of Hust's claim to the respondent's marine P. &

I. underwriters (Petitioner's Brief, Page 45), means nothing when rightly understood. The War Shipping Administration was carrying its own *war* P. & I. insurance, but it was leaving it to the agents to arrange with their own P. & I. underwriters for *marine* P. & I. insurance, which was, however, for the account of the War Shipping Administration, and was *paid for* by the War Shipping Administration. Naturally, therefore, since this accident appeared to be a marine, rather than a war risk, the War Shipping Administration said to respondent: "Refer this to your marine P. & I. underwriters."

6. On Page 48 petitioner makes the extreme suggestion that it was respondent's duty to "maintain" the ship, even to the extent of seeing to it that the bulb light was burning and the guard-chain was in place. How the respondent was to do this some ten thousand miles away petitioner does not make clear.

There was no duty on the respondent to maintain the vessel in such a sense. Its duties are clearly set forth in Article 14 of the Agreement. R. 159. It shall, unless otherwise instructed, and subject to the regulations, instructions and methods of supervision and inspection prescribed by the United States, arrange for the repair of vessels, etc., and generally shall cooperate with the United States in making inspections and investigations. These of course refer to general overhaul repairs, etc., when the vessel is in port. While at sea the vessel is under the

sole management and control of the master. Article 3A(d). R. 151.

7. On Page 49, and again on Pages 58 to 60 of the Petitioner's Brief, it is contended that under this Agency Agreement the respondent became the owner "pro hac vice" of the ship. This certainly indicates a lack of comprehension of what that term means. In general, it means a charterer who takes a vessel from the owner on a bareboat basis. The owner relinquishes all control; and the charterer mans, equips and supplies the vessel, and exercises complete physical control of her. How different that is from the present case needs no comment.

It is interesting to note, in this connection, the title of the Service Agreement. R, middle of Page 150. It reads:

> "Service Agreement for Vessels of Which the War Shipping Administration Is Owner or Owner Pro Hac Vice."

How the War Shipping Administration and the Agent could *both* be owners pro hac vice, counsel has not explained.

All of the items of so-called "evidence of employment" suggested by petitioner are not even a scintilla when propertly understood; but even if they were, they would have to yield to the clear and express provisions of Article 3A(d) of the Agreement, which make it about as clear as the English language

can, that these War Shipping Administration crews engaged by the master and under his sole control are not employees of the Agents. "It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences." George v. Missouri P. R. Co. 213 Mo. App. 668, 251 S. W. 729, quoted with approval by this Court in the Chamberlain case, Supra, 288 U. S. at Page 341, and in 77 L. Ed at Page 824.

To conclude, the respondent Moore-McCormack Lines, Inc., for the reasons given in this brief, opposes the petition, and asks that it be denied.

Respectfully submitted,

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OCTOBER TERM, A.D. 1945

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MOORE-McCORMACK LINES, INC.,
Respondent and
Defendant-Appellant below.

BRIEF OF RESPONDENT MOORE-McCORMACK LINES, INC. ON THE MERITS

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In the Supreme Court
of the United States

OCTOBER TERM, A.D. 1945

No. 625

CECIL I. HUST,
Petitioner and
Plaintiff-Respondent below,

v.

MOORE-McCORMACK LINES, INC.,
Respondent and
Defendant-Appellant below.

BRIEF OF RESPONDENT MOORE-McCORMACK LINES, INC. ON THE MERITS

STATEMENT OF THE CASE

Except for a minor error in saying that petitioner was injured on March 9th, instead of March 17th, (Pleadings and R. 56), the case has been correctly stated in the opinion of the Oregon Supreme Court, 158 Pac. (2d) 275; 1945 A.M.C. 517. (Petitioner's statement makes the same mistake as to date). The

case has also been correctly stated in our brief, already filed, opposing the petition. Therefore we make no further statement now except to criticize and disagree with petitioner's statement in the following particulars: His petition says on P. 3, that: "Respondent did not attempt to show in what ways, if any, the actual practice of employing crews and operating ships had changed since before the war, when it would have been clearly liable in such a case, but relied principally upon the terms of the General Agency Agreement." Of course we relied on the General Agency Agreement. But the rest of that statement is incorrect. The whole effect of the evidence was that the entire shipping of the United States, and employment of crews, had undergone a vital change, namely, one from private operation under peacetime conditions to government operation under war conditions.

We also criticize, although we do not regard it as very important, the statement on Page 2 that "the company and unions continued to negotiate for the settlement of disputes. R. 103." It does not appear from the testimony referred to that there ever were any disputes. But if there had been, any action with respect thereto, taken by respondent, would, of course, have been in its capacity as agent, and as it was bound to do in pursuance of its duty to "procure and make available" crews for engagement by the Master. (G.A. Agreement, Article 3A(d)).

In this connection it is well to observe that any changes in the Collective Bargaining Agreements were to be made, *not* by the agents, but "by mutual agreement between the War Shipping Administration and the unions." R. 165, 172.

No further statement need be made now. The issues are:

1. Was petitioner Hust, an employee of the respondent, entitling him to sue the respondent under the Jones Act, or was he an employee of the War Shipping Administration? And,

2. Was any negligence shown on the part of the respondent?

ARGUMENT

In its former brief, opposing the petition for the writ, respondent contended that this case presented no Federal question of substance. Since this Court, by issuing the writ, has now decided otherwise, that part of the former brief has become moot. It therefore seems proper to present this brief on the merits, in which, conceding that a Federal question is involved, we shall confine our argument to showing that the Oregon Court decided that question correctly. Necessarily, however, this brief will have to repeat much that was said in the former, since it, like the former, will have to discuss the evidence. While adhering to the views expressed in the former brief,

(which was concise perhaps to the extreme point of brevity), we shall, now that the case will be heard upon the merits, expand those views further and in more detail.

PETITIONER WAS NOT AN EMPLOYEE OF RESPONDENT AND THEREFORE CAN NOT SUE RESPONDENT UNDER THE JONES ACT (46 U.S.C.A., Section 668)

The Jones Act

Under this Act, the employer-employee relationship is a prerequisite to the suit. Without it the plaintiff must fail. And the relationship must be the "conventional", "natural" one as commonly understood.

Robinson v. Baltimore Ohio R. R. Co., 237 U.S. 84.
Hull v. Philadelphia Reading Ry. Co., 252 U.S. 475.
Panama R. R. Co. v. Johnson, 264 U.S. 375.
The Norland, 101 F. (2d) 967.
Nolan v. General Seafoods Corp., 112 F. (2d) 515.

Under the "Service Agreement" the Respondent Was a Mere Limited Agent; Not an Employer

As everyone knows, the United States, through the United States Maritime Commission and the War Shipping Administration, in the prosecution of the war, requisitioned the ships of private owners, and built a huge fleet of its own. Various devices for the

operation of all these vessels were tried or suggested, as e.g., the bareboat charter agreements mentioned in Article 20 of the present Service Agreement, but the method finally adopted was to have the War Shipping Administration operate the vessels itself, but assign them to General Agents, under a "Service Agreement" to attend to the "business" of the vessel. (Def. Ex. 21, R. 149; offered at 116). That Service Agreement is the one which determines the status of the respondent Moore-McCormack Lines, Inc., in this case, and defines its relationship to the vessel. We must look to it, therefore, to determine whether respondent was the employer of the crew on said vessel. That agreement was prepared by the War Shipping Administration and not by this respondent. Petitioner concedes that it is carefully drafted, (Brief, P. 34). The language throughout is carefully guarded to show that the agent's duties are confined to the "business" of the vessel and not to its physical operation. The keynote is struck in the very first Article: "The United States appoints the General Agent as its *agent* and *not as an independent contractor,* to manage and conduct the *business* of vessels assigned to it by the United States from time to time". (Throughout this brief italics are ours unless otherwise indicated).

In Article 2 the General Agent accepts the appointment: "The General Agent accepts the appointment and undertakes and promises so to manage and conduct the *business* for the United States, in accord-

ance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to and accepted by the General Agent for that purpose."

All the rest of the agreement is merely a detail or itemization of the "business" of the vessel and of the agent's duties in managing and conducting it. And we interject here, and may advert to it later, that there is not a single word in the whole agreement that indicates that the agent is to be the physical operator of the ship.

Article 3 is: "To the best of its ability, the General Agent shall *for the account of the United States:*

"(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyages, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices."

Counsel has seized on the word "maintain". Of course here it merely means that the vessel shall be placed or used in whatever trade or service the United States directs.

Article 3A (b) is that the agent shall, for the account of the United States: "Collect all moneys due

the United States under this agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States for all moneys collected or disbursed by it or its agents." Article 3A (c) is that the General Agent shall, for the account of the United States: "Equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe". Note that the very vital and significant word "man" is left out. The usual phrase in charters or shipping agreements is that one party or the other shall "*man*, equip and supply"; or, in charter parties, it is said that the vessel being "well and sufficiently *manned*, equipped and supplied and in all respects seaworthy", etc. The omission of that word here is deliberate, and is in accord with the next paragraph, which indicates quite clearly that the War Shipping Administration is to man the ships. Before we come to that next paragraph, however, we do not fail to notice the word "maintain" the vessels, for counsel has seized upon it. It has no importance in this case because this particular vessel *was* maintained; and maintenance has no bearing on the question of employment anyway. But it is further to be noted that the agent's duty is merely, to the best of its ability, "maintain the vessels, subject to regulations, instructions or methods of supervision and in-

spection as the United States may from time to time prescribe." And this is to be read in connection with Article 14, which says that the agent "shall *arrange* for the repair of the vessels", but always "subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States". And the testimony of Mr. Tripp in this case, which was uncontradicted, shows that in reality all this business of maintenance and repair was taken over and done by the War Shipping Administration itself. R. p. 124, 125.

But to return to the important subject of manning, we have noticed its omission from the equipping, victualing and supplying section, where naturally it would appear if the agent were to do it, and we come now to Article 3A (d), where the thing is made clear beyond peradventure. This is it:

"The General Agent shall *procure* the Master of the vessels operated hereunder, subject to the approval of the United States. *The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel.* The General Agent shall *procure* and *make available* to the *Master* for *engagement by him the officers and men required by him to fill the complement of the vessel.* Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary prac-

tices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. *The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.*"

As we have said before, this Service Agreement was prepared by the War Shipping Administration and was carefully drawn, and we do not see how the English language could make any plainer the fact that the crew of the ship is employed by the War Shipping Administration and not by the agent. The steps are in clear and logical sequence,

1. The master is the "agent and employee of the United States";
2. The crew is made available to the master "for *engagement* by him";
3. The officers and members of the crew are "subject only to the orders of the master"; and
4. All such persons are paid "with funds provided by the United States hereunder".

We do not intend to go through the whole Service Agreement and dissect it clause by clause. It is too long. But we remark that if there were, in subsequent clauses, any inferences, as counsel would have us believe, that the respondent was the employer of

petitioner, those inferences would have to give way to the clear and explicit provisions of Article 3A (d). There are, however, no such inferences. The whole agreement adheres consistently to the idea that the agent shall attend only to the "business" of the vessel, and not to its manning or physical operation or control.

Article 3A (e) refers to bills of lading. It may be noted that the last sentence thereof says that such bills may provide "that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof", which is merely a further indication that the General Agent was not physically operating the ship.

Article 3B is immaterial. So are Articles 4, 5 and 6. Article 7 provides that the United States shall reimburse the General Agent for the moneys which the General Agent shall disburse for the Government, including, be it noted, wages.

Article 8 relates to insurance, and we shall have more to say of it later when we comment on one of petitioner's contentions.

Article 9 relates to general average and says, as indeed the agreement does throughout, that the agent in all respects shall comply with the instructions of the United States.

Article 10 relates to salvage, and gives the United States complete control over salvage claims and

awards. This is interesting because it is usual for the owner of a salving vessel to include in his claim against the other vessel the claims of his own crew. In other words, he looks after his own crew. If the agent were the employer of the crew, as counsel contends, the natural thing would be for the agent to look after its salvage claims.

Arficle 11, 12 and 13 are unimportant.

Article 14 relates to repairs and maintenance. Note that it does not say that the General Agent shall repair the vessels or maintain them. It only says that the agent shall, unless otherwise instructed, "arrange for" the repair, etc., "subject to such regulations, instructions or methods of supervision and inspection as may be prescribed by the United States", and shall cooperate with the United States in making inspections or investigations, etc.

Article 15 is not important.

Article 16 says that the United States shall indemnify and hold harmless the agent against claims for injury to persons or property.

Counsel seizes on this to say: "How could there be a crew claim against the agent unless the agent were the crew's employer?" This is a non sequitur. A defendant in a tort action is not always the employer. But passing that, the very existence of this suit shows the propriety of the agent having indemnification.

In this connection it may be noted that the Agents, as a war-time service, threw themselves wholeheartedly into the job of attending to the business of these ships for the War Shipping Administration, and did it *without any assurance of their compensation.* They left their compensation wholly to the discretion of the War Shipping Administration. "Article 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine."

It was certainly no more than right under these circumstances that the agent should be indemnified against all claims of every possible kind.

The remaining articles of the agreement are immaterial here.

In view of Counsel's persistent claim that respondent was the "operator" of the ship,—as e.g., "The most important single issue in this case is whether respondent company was the operator of the ship", (Brief, P. 28),—we call attention again to the fact that nowhere in the whole agreement is the agent referred to as "the operator". In fact that word nowhere appears. It would not, however, be very important if it did; for it is a word very loosely used in the shipping world and can mean anything from an outright owner to a subagent. It is true that some-

times the agreement refers to the ships "operated hereunder"; but that can mean operated by the War Shipping Administration as well as operated by the agent, and in view of the clear terms of the agreement limiting the agent's duties to that of the "business" of the vessel, it is clear that the physical control of the ship and the employment of her crews were not in the agent. If they were intended to be, why did not this "carefully drafted" agreement say so?

The same may be asked in reference to counsel's suggestion that the master and the crew may have been jointly employed by both the War Shipping Administration and the agent. Again we ask: "Why does not the agreement say so, or even intimate it?"

That the business of the vessel was the limit of the agent's duties is not only fully evident from the agreement itself, but it is confirmed by the War Shipping Administration's General Order 21 (Defendant's Exhibit 27, R. 174, offered at R. 131), which reads as follows:

> "§306.3 *General agents defined.* A general agent is one who takes care of the vessel's business on behalf of the War Shipping Administration, under a standard form of service agreement (GAA-4-4-42), appoints agents as directed by the War Shipping Administration to handle those functions which relate to the handling of the cargo and functions incidental thereto, and assumes those duties when not otherwise instructed, obtains all accounting for all revenue and expenses and accounts to the War Shipping Administration for all business of the vessel."

The "Statement of Policy"

It is immaterial whether petitioner Hust knew of the terms of the Service Agreement or not. For, as said in *Murray v. American Export Lines,* 53 Fed. Supp. 861, 863, while the rights of principal and agent inter se are not the measure of the rights of third persons against either of them for their torts, "nevertheless the contract between principal and agent may show who is in control of the operation of the vessel, whose orders the members of the crew are required to obey and who is their employer". And as said even more explicitly in *Steele v. American South African Line,* 62 Fed. Supp. 636, 638: "I cannot see how a cause of action specifically created by statute can be maintained against any party, other than the party statutorily charged with liability. Unawareness of the identity of the employer, at the time of signing on the vessel, is not, in my opinion, legally sufficient to fasten statutory liability upon a party not made responsible by the terms of the statute." i.e., the Jones Act. (Same case reported in 1945 A.M.C. 1505.)

But as a matter of fact full knowledge of the agreement, and particularly of the important paragraph 3A (d) relating to employment, must be imputed to Hust. For both the Service Agreement and General Order 21, limiting the agent's duties to the "business" of the vessel, were published in the "Federal Register", and under the law constituted notice

to all the world, including Hust.

Far more important than this, the decisive paragraph 3A (d), relating to crew employment, was the subject of special consideration between the War Shipping Administration and the maritime unions, and was expressly agreed to in writing by them. This writing is known as the "Statement of Policy". (Def. Exhibit 25, R. 164-168, offered at R. 130). There are several of these Statements of Policy, one for each of the maritime unions, but all are practically identical. The one relating to petitioner Hust's union (Pacific Coast Seamen, Firemen and Cooks and Stewards) begins at R. 167. Each of these Statements of Policy quotes in full the important paragraph 3A (d) in which:

1. The Master is designated as the "agent and employee of the United States", with "full control" over the navigation and management of the vessel;
2. The master shall *engage* the crew;
3. The crew shall be subject *only* to his orders; and
4. Shall be paid with funds provided by the United States.

Thus Hust's own collective bargaining agent not only knew of this feature of the Service Agreement, but actually agreed to it in writing. Indeed the in-

ternal evidence suggests that these Statements of Policy and Paragraph 3A (d) of the Service Agreement were not merely agreed to by the unions, but were actually insisted upon by them, to insure that crews would be procured through their union halls, and not otherwise.

If there is anything at all to collective bargaining, and of course there is, since it is the order of the day, knowledge of the Service Agreement, and especially 3A (d) must be imputed to Hust as much as if he had signed it himself. We repeat, however, that such knowledge was not essential. The status of the agent was fixed whether Hust knew it or not.

Counsel, in their brief in reply to the one we filed in opposition to the petition, refer, at Page 12, to this Statement of Policy as a "masterpiece of legal equivocation". We do not think it is. But it is enough to say that, like the Service Agreement, it was prepared by counsel for the War Shipping Administration and not by this respondent, who was not even a party to it. Moreover, it was signed by the unions who, as everyone knows, do not lack able counsel.

By the "Shipping Articles" Hust Became an Employee of the United States

Consistent with the foregoing plan that the master was to "engage" the crew from men made "available" to him by the agent, the master of the SS "Mark Hanna" did so engage the crew for that ship, and,

among them, petitioner Hust. This contract of hiring or "engagement" was, as required by law, in the form of "Shipping Articles", entered into between the master and the crew, including Hust, in the presence of the Deputy Shipping Commissioner. These Articles are in evidence as plaintiff's Exhibit 13 (R. 142 and 143, and were offered at R. 92). The pertinent part reads:

> "IT IS AGREED between the Master and seamen, or mariners, of the S. S. 'MARK HANNA' of Portland, Oregon, of which Henry Hoeppner is at present Master, or whoever shall go for Master, now bound from the Port of Portland, Oregon, to a point in the Pacific Ocean to the westward of Vancouver, Washington, and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any Department, Commission or Agency thereof and back to a final port of discharge on the Pacific Coast in the United States to be designated by the Master, for a term of time not exceeding Twelve (12) calendar months."

Then follow the usual printed provisions; then a rider subjecting the Articles to the Maritime War Emergency Board's Decisions; with the Master's signature appearing at R. 142, and Hust's at R. 143, where the "Particulars of Engagement" are further stated. (The sheets containing the Particulars of Engagement for other departments of the crew have been, by stipulation, omitted). Four things should be especially noted in these Articles:

1. They are between the Master (and *not* the General Agent) and the crew.

2. The voyage is to be anywhere that "the Master may direct or as may be ordered or directed by the United States Government or any Department, Commission or Agency thereof".

3. The rider reads as follows:

> "It is also agreed that bonus areas, bonus payments, insurance, reimbursements for lost personal effects, wages during internment, and repatriation coverages for all licensed and unlicensed personnel shall be governed by the Maritime War Emergency Board Decisions Nos. 1, 2, 3, 5, 7 & 8, with supplements, amendments, revisions, clarifications, corrections and attachments, and such subsequent decisions as may be applicable to the present voyage."

As said of a similar rider in *Williams v. American Foreign SS Corp.*, 1946 A.M.C. 98, 100:

> "It certainly cannot be considered that the Maritime War Emergency Board is an agency or arm of the defendant. The court will take judicial notice of the fact that it is a governmental agency."

4. Near the head of the Articles, below the name of the ship, "Mark Hanna", and in the "block" provided for that purpose, are these words:

> "War Shipping Administration (Owner) Washington, D. C.
> Moore-McCormack Lines, Inc. (General Agents) 5 Broadway, New York, N. Y."

Thus affording clear notice to Hust when he signed the Articles that respondent Moore-McCormack Lines, Inc., was not the owner, but only an agent.

The logical conclusion from all this—the Service Agreement, the Statement of Policy and the Shipping Articles—is that the master "as an agent and employee of the United States", "engaged" the crew on behalf of the owner of the vessel, the United States, which retained full control of the vessel, directed her voyages, etc., and that Hust was an employee of the United States and not of the General Agent, Moore-McCormack Lines, Inc. There is no escape from this conclusion. It is, moreover, entirely confirmed by the language of Public Law 17, to which we shall advert later. But in the meantime we call attention to the decisions of the lower courts.

DECISIONS OF THE LOWER COURTS

A majority of the lower courts have held, with us, that General Agents under this Service Agreement are not employers of the crews. Some have held otherwise, apparently influenced by this Court's decision in *Brady v. Roosevelt Steamship Co.;* as to which we cannot avoid the feeling that one reason why this Court has granted Hust's petition for the writ is to afford an opportunity to correct the misinterpretations that have been placed upon that case.

Following are the cases which have decided this

question in accordance with our contentions:

Hust v. Moore-McCormack Lines, Inc., 158 Pac., (2d) 275 (The present case).

Murray v. American Export Lines, 53 F. Supp. 861 (U. S. District Court, S. D., N. Y.).

Lewis v. U. S. Nav. Co., 57 F. Supp. 652, (U. S. District Court, S. D., N. Y.) (Decided, however, against the agent on another ground).

Walsh's Case, 1945 A.M.C. 747, 749, (U. S. District Court, S. D., N. Y.).

Ferris v. American South African Line, 1945 A.M.C. 1296, 1300 (U. S. District Court, S. D., N. Y.).

Williams v. American Foreign SS Corp., 1946 A.M.C. 98, (U. S. District Court, S. D., N. Y.).

Conlon v. Hammond Shipping Co., 55 F. Supp. 635, (U. S. District Court, N. D., Cal.).

Baker v. Moore-McCormack Lines, Inc., 57 F. Supp. 207, (U. S. District Court, N. D., Cal.).

Steele v. American South African Line, 1945 A.M.C. 1505; 62 F. Supp. Adv. Sheets 636, (U. S. District Court, N. D., Cal.).

McInnis v. U. S. of America and General SS Corp., 1945 A.M.C. 1039, (U. S. District Court, S. D., Cal.).

Fox v. Alcoa SS Co., 143 Fed. (2d) 667, (C.C.A., 5th Circuit), where it was conceded that there was no good claim against the agent.

Neilsen v. American President Lines, 1944 A.M.C. 1169, (New York Supreme Court, N. Y. County).

Pedersen v. Stockard SS Corp., 1945 A.M.C. 23, (New York Supreme Court, Appellate Division).

Algiere v. Cosmopolitan Shipping Co., 1945 A.M.C. 906, (New York Supreme Court, Appellate Term).

All of the foregoing cases consider the identical Service Agreement involved in the present case, and hold flatly that under it the seaman is not the employee of the agent.

We do not, of course, intend to quote from all the foregoing cases. That would be too long. Nor shall we quote from the Oregon case, since it is the one under review. But we shall quote from two others because they illustrate the general tenor of them all, and because they state clearly and succinctly the position taken by us.

In *Baker v. Moore-McCormack Lines, supra,* Judge Roche, in the Northern District of California, said:—

> "Pursuant to the 'Service Agreement' between the United States and Moore-McCormack Lines, Inc., the defendant was the general agent of the United States with respect to the vessel. Murray v. American Export Lines, Inc., D. C. S. D. N. Y., 53 F. Supp. 861, 1943 A.M.C. 1426. As such agent of the United States, the defendant is suable for its own torts. Brady v. Roosevelt SS Co., Inc., 317 U. S. 575, 63 S. Ct. 425, 87 L. Ed. 471. However, a seaman's action under the Jones Act may be maintained only against the seaman's employer. Panama R. R. Co. v. Johnson, 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748; Kwasizur v. Dawnic S. S. Co., D.C. Penn., 25 F. Supp. 327; Gardiner v. Agwilines, D.C.N.Y., 29 F. Supp. 348; The New Brooklyn, D.C. Mass., 37 F. Supp. 955; Eggleston v. Republic Steel Corp., D.C.N.Y., 47 F. Supp. 658.
>
> "If plaintiff wishes to follow the Jones Act against his employer, the United States, he may do so under certain conditions pursuant to the

provisions of the Suits in Admiralty Act, 46 U.S.C.A. §741 et seq., and by virtue of Public Law 17, 50 U.S.C.A. Appendix §1291, irrespective of whether the vessel is a merchant vessel or a public vessel. However, the suit against defendant Moore-McCormack Lines, Inc., cannot be under the Jones Act, inasmuch as the defendant did not man the vessel and was not plaintiff's employer. . . . ." 57 F. Supp., at Page 208.

In *Steele v. American South African Line, supra*, which arose on a motion to remand to the state court, Judge Goodman, in the Northern District of California, said:—

"It is first urged that, in fact, defendant and not the United States was plaintiff's employer. However, by the 'Service Agreement' between the defendant and the United States War Shipping Administration, the United States and not defendant was plaintiff's employer. See my decision in Conlon v. Hammond Shipping Co., Ltd., D.C., 55 F. Supp. 635; Murray v. American Export Lines, Inc., D.C. 53 F. Supp. 861; Baker v. Moore-McCormack Lines., D.C. 57 F. Supp. 207 (decision of Judge Roche)."

(Here follows a discussion of Lewis v. U. S. Nav. Co., supra. The opinion is unable to agree with that case and holds, on the contrary, that: "Unawareness of the identity of the employer at the time of signing on the vessel, is not, in my opinion, legally sufficient to fasten statutory liability upon a party not made responsible by the terms of the statute".)

"Plaintiff suffers no prejudice nor loss of substantial rights. He may maintain his cause against the United States, his employer, by virtue of Public Law 17, 78th Congress, 50 U.S.C.A. Appendix §1291, as if he were proceeding under the

Jones Act. He also has the right to maintain an action against defendant for damages for maritime tort. See Brady v. Roosevelt S.S. Co., 317 U.S. 575, 63 S. Ct. 425, 87 L. Ed. 471." 62 F. Supp. Adv. Sheets, pp. 637-638. Also 1945 A.M.C., pp. 1506-1508.

From this review of all the cases it is quite apparent that the decided weight of authority, both in the number of decisions and in the rank of the courts, is in favor of our position that Hust was not an employee of this respondent and cannot sue it under the Jones Act.

Against the fourteen cases which support us, counsel, on Page 11 of his brief, cites five. Only two are in a Federal Court, and it is the same court in both,—the U. S. District Court, Eastern District, Pennsylvania. The other three are in inferior state or city courts.

Those five cases are:

McCormick v. Moore-McCormack Lines, 54 F. Supp. 399, (U. S. District Court, E. D. Pa.);
Bast v. American-Hawaiian SS Co., 1945 A.M.C. 503, (U. S. District Court, E. D. Pa., merely follows the former case without discussion);
Gay v. Pope & Talbot, Inc., 1944 A.M.C. 855 (New York Supreme Court, Special Term);
Shaller v. Matson Nav. Co., 1943 A.M.C. 839; and
Moss v. Alaska Packers Ass'n., 1945 A.M.C. 493.

(Counsel also says "See also" *Carroll v. United States*, 133 Fed. (2d) 690, and *Lewis v. U. S. Naviga-*

tion Co., 57 Fed. Supp. 652. A glance at the Carroll case will show that it has no bearing on ours; and the Lewis case is in our favor.)

To return to counsel's five cases:

1. The McCormick case, supra, was a motion for summary judgment. The Agency Agreement is not discussed. The decision, in our opinion, is based on a misinterpretation of the Brady case.

2. The Bast case, supra, also a motion for summary judgment, being in the same court, merely follows the McCormick case without discussion.

3. Gay v. Pope and Talbot, supra, was in the N. Y. Supreme Court. It was a motion to dismiss. The only question was whether Public Law 17, 78th Congress, First Session, provided an "exclusive remedy", and "superseded" the Brady case. The opinion in its final paragraphs recognizes the propriety of the decision in Murray v. American Export Lines, supra, which supports us throughout. Any implications that a seaman can sue the Agent under the Jones Act are entirely overthrown by the three *later* decisions, in this *same* court, that he cannot. We refer to the Neilsen, Pedersen and Algiere cases, supra, cited in the list supporting us.

4. Shaller v. Matson Nav. Co. hardly deserves notice. It was a motion to dismiss in the "City Court of the City of New York". The defendant

was the owner of the vessel, and what kind of an Agency Agreement it had does not appear.

5. Moss v. Alaska Packers Ass'n., supra, was an appeal to the Superior Court of California from the Municipal Court of San Francisco. It was a suit for wages, transportation, maintenance and cure—not a suit for damages. It was not under the Jones Act. The implications therein that plaintiff was an employee of the Agent are, in our opinion, untenable, and the reference to the Brady case, mistaken.

From the foregoing collection of the authorities—both for and against—it is plain that the statement on Page 11 of petitioner's brief that "the majority of decisions supports the position of the petitioner and is opposed to the decision appealed from in this case," is in error. On the contrary, it is evident that the great weight of opinion is in favor of our position that under this Service Agreement, the Agent is *not* the employer and cannot be sued under the Jones Act.

PUBLIC LAW 17, 78TH CONGRESS, FIRST SESSION
U.S.C.A. Title 50, App. §1291

Petitioner Hust was hurt on March 17th, 1943. R. 56. Public Law 17, known as the "Clarification Act", was approved 7 days later, March 24, 1943, and was therefore not in effect at the time of the injury. It

nevertheless throws an illuminating light on how Congress and the War Shipping Administration regarded these seamen, and fixes upon them clearly the status of employees of the United States.

Before considering Public Law 17, it may be well to review briefly what the law was before that act was passed. Ever since *Panama R. R. Co. v. Johnson*, 264 U. S. 375; 68 L. Ed. 748, it has been the law that the Jones Act was applicable to suits in admiralty as well as to actions at law. Therefore any seaman employed on a merchant vessel of the United States had a right to sue the United States under the Suits in Admiralty Act, and in such suit all the substantive rights of the Jones Act applied. Such was Hust's case. Irrespective of Public Law 17 and its retroactive provisions, he could have sued the United States under the Suits in Admiralty Act, and he could have had all the substantive rights of the Jones Act, providing, of course, that the "Mark Hanna" was a merchant vessel. (And there is nothing in the record to show that she was not.)

There was, however, apparently some doubt as to whether such a seaman could sue if he were injured on a "public vessel". There was also the necessity (to prevent double indemnity) to take these seamen out of the provisions of the United States Employees' Compensation Act, the Civil Service Retirement Act, etc., since they had, and were to retain, all the substantive *rights* (but not the *remedy*) of privately em-

ployed seamen, including those of the Jones Act. A further reason for passage of the Clarification Act was that the War Shipping Administration, faced with thousands of claims for injuries on the huge fleet it was operating, wanted an opportunity to settle these claims amicably out of court before suit was begun. This was also to the advantage of the seamen. Hence the provision that no suit could be begun until the claim was "administratively disallowed".

With these preliminary remarks, let us turn to the statute itself. It is full of explicit references to these seamen as employees of the United States. For example,—

> "Sec. 1. That (a) officers and members of crews (hereinafter referred to as 'seamen') *employed on United States* or foreign flag *vessels as employees of the United States through the War Shipping Administration* shall with respect to . . . . . (2) death, injuries, illness, ... have all of the rights, benefits, exemptions, privileges and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. . . . . Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act."

The rest of the act is full of such terms as "officer or member of the crew as an employe of the United States, employed through the War Shipping Adminis-

tration", (Section 1 (b), subsection (i), relating to taxes on wages); and the same phrase is repeated in Section 1 (b) (o), relating to social security taxes, and the Administrator is referred to as "such Administrator as an employer", etc. The House Report accompanying this legislation, which will be found in 1943 A.M.C., commencing at Page 606, is comprehensive and clear and makes it abundantly plain that these seamen are employees of the United States through the War Shipping Administration; that they have the substantive rights of the Jones Act, but to be enforced under the Suits in Admiralty Act. For example, thus, at 1943 A.M.C., Page 606: "The effect of Section 1 is to provide that officers and crew members who are employed on behalf of the United States through the War Shipping Administration shall be put on the same basis as seamen in private employment with respect to rights, benefits and privileges in connection with employment, particularly in case of death, injury or other casualty. Under the bill, these employees of the War Shipping Administration will have the seaman's rights to wages, maintenance and cure, in case of illness or injury in the ship's service They will have the benefits of the Public Health Service, including marine hospitals, like other seamen. They will have old-age and survivors' insurance under the Social Security Act. They will continue to have the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances, and they

(and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. *Such seamen will have the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act* except that claims with respect to social-security benefits shall be prosecuted in accordance with the procedure provided in the social-security law. . . . ."

The report is much too long to quote, or from which to take many excerpts, but this, on Page 623, is illustrative of the whole thing:

> "The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully set forth hereinabove. Under clause 2 of section 1 (a) these *substantive rights* would be governed by existing law relating to *privately* employed seamen. The only modification thereof arises from the *remedial* provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States."

Petitioner in his brief, it seems to us, has continually confused rights and remedies when he points to the fact that Public Law 17 and the Report both speak of the seaman having the same *rights* as private seamen. He always overlooks the fact that both the statute and the Report immediately couple this by saying that the *remedy* shall be under the Suits in Admiralty Act. Thus, on Page 625 of the A.M.C. it

is said:

> "Seamen covered by section 1 being entitled thereunder to the *rights* provided under the Jones Act and the general maritime law and to the *remedies* under the Suits in Admiralty Act, would be expressly excluded from the benefits which otherwise would accrue to them as employees of the United States under the United States Employees' Compensation Act. This provision carries out the basic policy of section 1 under which seamen employed through the War Shipping Administration, though technically Government employees, have their rights determined as if they were in private employment under the applicable statutes and law. This is in conformity with the views and desires of seamen in general as expressed through their representatives."

We have quoted this passage also for another reason. It contains the phrase "though technically government employees". Counsel, on Page 53 of their brief, have seized on this phrase to claim that these seamen are only technically government employees, and not really such under the Jones Act. But the context of the passage shows quite clearly that all the writer meant was that these seamen, although given all the rights which we have discussed, were also "technically government employees" under the United States Employees' Compensation Act, and would get those benefits too unless excluded.

On Page 55 of counsel's brief they quote from the Senate Report, and it is a good example of how a wrong emphasis can infer a wrong meaning. Here is the way they have it:

"Inasmuch as seamen covered by section 1 will be entitled to the rights provided under the Jones Act and general maritime law *and* to the remedies under the Suits in Admiralty Act, they are expressly excluded from any benefits which would otherwise accrue as employees of the United States under the United States Employees' Compensation Act." (their emphasis)

We submit that if any emphasis is to be supplied, it is to be like this:

"Inasmuch as seamen covered by Section 1 will be entitled to the *rights* provided under the Jones Act and general maritime law, and to the *remedies* under the Suits in Admiralty Act." etc.

We call attention to one more feature of the House Report, before leaving it. The purpose of our reference is to show that the House Committee was quite familiar with the "Service Agreement", the "Statement of Policy", and the Collective Bargaining agreements, and, being thus fully cognizant of the whole method of employment as practiced in this case, recognized that the seamen were employed by the War Shipping Administration. Here is what the Report says, 1943 A.M.C. 617:—

"The vessels owned by the War Shipping Administration or under bareboat charter to it are operated by experienced steamship companies as general agents for the Administrator. (Note the loose use of the word 'operated', as we have remarked earlier in this brief.) The agreements between the Administrator and the general agents specifically provide that the general agent shall

procure and make available officers and crews for War Shipping Administration vessels 'through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time.'

"The intention of this provision is to authorize the general agent to procure his seagoing personnel through his customary channels in cases where the general agent had previously operated under union contracts. This provision also avoids favoritism as to conditions between one general agent and another or as between one union and another.

"Shortly after the appointment of the Administrator, he adopted a statement of labor policy in which he specifically provided that 'the provisions of the existing collective bargaining agreements be continued and observed unless changed by mutual agreement.' Accordingly, the seamen *employed by the War Shipping Administration through its general agents* are entitled to all of the contractual rights of seamen on commercial vessels, including overtime compensation, alty (sic) provisions, and so forth. By this means, there have been pre-alty (sic) provisions, and so forth. By this means, there has been preserved existing labor structures which have been built up in a process of experimentation and evolution, and there has been maintained and utilized for the war effort the experience of responsible organizations and leadership. *Although employees of the Government*, these seamen are paid by the general agents directly in the same manner as payment is made in commercial operations, the funds for such payment having been lodged in bank accounts maintained by the general agents out of revenues received from the operation or

from advances made by the Administrator."

Certainly this can leave no doubt of what the House, through its Committee, thought of the matter.

THE INTERNAL REVENUE CODE

As a further evidence of legislative intent, we refer briefly to §1621 of the Internal Revenue Code, (U.S.C.A. Title 26 Appendix). It says, in part:

> "For the purpose of paragraph (8) (which refers to services outside the United States) services performed on or in connection with any vessel *as an employee of the United States employed through the War Shipping Administration* shall not constitute services performed outside the United States."

REMARKS UPON PETITIONER'S BRIEF

As most of these remarks pertain to the question of employment, we make them at this place, deferring to later pages the discussion of our second point,—that no proof of respondent's negligence was shown.

The Brady Case

Counsel relies strongly on this case. We have never understood why. It is different from the present case in almost every respect. It was not under the Jones Act. The man was not an employee, but was a customs inspector boarding the ship. The Agency Agreement required the agent to "man" the ship, which our present agreement does not. The only ques-

tion was whether the Suits in Admiralty Act gave the General Agent an immunity from its own torts. As Mr. Justice Douglas said: "The sole question here is whether the Suits in Admiralty Act makes private operators such as respondent nonsuable for their own torts." 317 U.S., at Page 577. Of course we make no such claim here.

Petitioner's Claim That the Agent Was the "Operator"

At various places throughout Petitioner's Brief, the claim is made that the agent was the "operator", —meaning the physical operator of the vessel,—and the suggestion is made, though it must be confessed somewhat faintly, that it was the agent's duty to maintain the ship even though ten thousand miles away at sea, and that the master and the crew, although employees of the United States were also "agents" of the General Agent for that purpose.

It seems sufficient answer to this to say that neither the Service Agreement nor any of the evidence in the case is susceptible of that construction. If the Service Agreement had intended anything like that why does it not say so? Do the words that the master shall be an "agent and employee of the United States, and shall have "full control" of the vessel, and the crew shall be subject "only" to his orders, mean nothing?

In this connection we may advert to counsel's ref-

erence to the admission in respondent's answer that "at the time of the accident alleged it was operating the liberty ship SS 'Mark Hanna' for and on behalf of the United States of America, represented by the War Shipping Administration, under a written Agency Agreement prescribing and limiting the duties, authority and functions of this defendant." (Petitioner's Brief, P. 48). We have before pointed out the extremely loose use of the words "operates", "operator", etc. They have all shades of meaning. For example Tripp speaks of "the operation of these vessels for the War Shipping Administration", but explains "it is practically all accounting". R. 117. The allegation in the complaint which respondent was answering was "That among said vessels which defendant corporation operates, manages and controls is a vessel generally known as a liberty ship named the SS 'Mark Hanna'." (R. 3). When the respondent answered, *denying* that it employed plaintiff or managed or controlled the ship, but admitting that it operated it in a very limited capacity under a certain written Agency Agreement, it came about as close as the English language could to stating the facts. As Justice Holmes is reported to have once said: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content, according to the circumstances and the time in which it is used." Bearing in mind the limited nature of the admission, and the fact that respondent's answer denied managing or controlling the ship,

(R. 6) and also denied that plaintiff was employed by it, certainly there is here no admission of physical control over the ship or her crew.

National War Labor Board and National Labor Relations Board Cases

It is claimed that two decisions, one by each of these Boards, cited at Pages 38 and 39 of petitioner's brief, show that seamen, like Hust, are employees of the General Agent. We do not know the facts in those cases. It appears from the quotation on Page 38 of petitioner's brief that "*the War Shipping Administration* had directed the steamship companies to negotiate contracts with the unions," etc. But whatever the facts, and whatever the effect of those decisions, they certainly cannot make Hust an employee within the meaning of the Jones Act. The relationship of employer and employee in Labor Board cases is sui generis, as was pointed out by this Court in *N.L.R.B. v. Hearst Publications,* 322 U.S. 111, and has nothing to do with the employer-employee relationship which is a prerequisite to an action under the Jones Act. It was long ago held in cases under the Employers' Liability Act, which of course was incorporated in the Jones Act, and is its foundation, that the employer-employee relationship must be the "conventional", "natural" one. *Robinson v. Baltimore, Ohio R. R. Co.,* 237 U.S. 84; *Hull v. Philadelphia Reading Ry. Co.,* 252 U.S. 475. And in *Panama R. R.*

Co. v. Johnson, supra, this Court said that "The statute (the Jones Act) is concerned with the relative rights and obligations of seamen and their employers, arising out of personal injuries sustained by the former in the course of their employment." The lower courts have, of course, always adhered to this view. *The Norland,* 101 Fed. (2d) 967, 971, and *Nolan v. General Seafoods Corp.,* 112 Fed. (2d) 515, 517, and all the cases heretofore listed in this brief as approving our position. Indeed no question was made of this at the trial.

Collective Bargaining Agreements

These are discussed on Pages 40 to 43, inclusive, of Petitioner's Brief. The gist of his argument is that since these agreements, which were in existence between the unions and the companies before the War Shipping Administration took over, refer to the companies as "employers", and since the War Shipping Administration's Statement of Policy "froze" the agreements, therefore the companies, even when acting in their capacity as agents, were frozen in their status as employers. At least that is the way we understand counsel's argument. It is, however, completely negatived by the pointed inclusion in the "Statements of Policy" of the all-important paragraph 3A(d) of the Service Agreement. Answering the same sort of argument, the Court said, in *Steele v. American South African Line, supra*: "However,

the claimed effect of this (collective bargaining) agreement is greatly weakened if not completely negated by the 'Statement of Policy' executed between Maritime Union officials and the United States War Shipping Administration. . . . ." (This is not in the body of the opinion, but in a note below. Nevertheless, was evidently said by the court). In view of this specific inclusion in the Statement of Policy of paragraph 3A(d), it is, like a good many things in Petitioner's Brief, a little beyond us how counsel can say, as he does on Page 41, that: "There was nothing to indicate that the War Shipping Administration was to be substituted for the companies as the employer under the union contracts. . . . ."

The business agent of the union himself, Mr. Warwick, who testified for petitioner, made it pretty plain what was meant by "freezing the union agreements". It was not the employer status. It was rather the wages and working conditions. He testified:

> "Q. You don't know the exact mechanics that the government went through to freeze these agreements, do you?
>
> "A. Only to the extent that the wages, working conditions, collective bargaining agreements —as far as freezing of the vessels themselves, I don't know. What I am talking about now is the working conditions of the unlicensed personnel. When I am talking about freezing, I am talking about freezing their working conditions, their overtime rates and collective bargaining agreements." (R. 102, 103)

That he was right is readily apparent from the language of the Statements of Policy themselves. It was "Wages and Working Conditions" (R. 167) that were frozen.

We have already pointed out that the collective bargaining agreements were to be continued "unless changed by mutual agreement between the *War Shipping Administration* and the unions." R. 165, 172.

In a word, the War Shipping Administration, as said by the Oregon Supreme Court, "took over the collective bargaining agreements, substituted itself as a party in place of the steamship companies, and the unions acquiesced". Significantly, the House Report, at 1943 A.M.C. 618, speaks of "the adoption of the collective bargaining agreements" by the Administrator.

Payment of Wages

On Page 44 counsel says that the seamen received their wages in cash in envelopes bearing the name of the respondent company; and bonus payments by checks issued by and on the company; and that deductions were made for social security taxes. We cannot see anything to this. The company was merely performing its duties as an agent under the agreement, which required it to pay the crew in the customary manner and be reimbursed by the government. As to the trifle that the pay envelopes bore Moore-McCormack's name, Mr. Tripp testified that they had

a large supply on hand and were using them up as a matter of economy. Counsel is mistaken in saying that the testimony (R. 62) shows that bonus payments were paid by check. It is silent on how they were paid, but it would not make any difference anyway.

Crew-Pass and Muster Cards

Petitioner introduced in evidence a "crew-pass and muster card", (Plff's Exhibit 1), bearing the company's name, without, however, designation as agent or employer. It was signed by the chief mate. It would seem to us to be of no consequence whatever, even if it had been issued by a representative of the company. It was probably like the pay envelopes, merely a bit of accumulated stationery which the company had used formerly in its operations. But at any rate, as the Oregon Court points out, there is no evidence at all that the chief mate—an employee of the War Shipping Administration—had any authority from the company to issue it.

Withholding Tax Forms

On page 45 of their brief, counsel points to the fact that the respondent issued to a fellow crewmember of Hust's a printed U. S. Treasury Withholding Tax Form, on which the company's name appears under the words: "Employer by whom paid". Of course. The Internal Revenue Code requires the

person paying the wage to withhold it even though he is not the employer. He is simply called the employer for the particular purposes of that statute. Section 1621 of the Internal Revenue Code, Title 26 U.S.C.A. says:

> "(d) Employer. The term 'employer' means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that—
>
> "(1) *if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' (except for the purpose of subsection* (a)) *means the person having control of the payment of such wages.*"

Correspondence Between War Shipping Administration and Company Regarding Claim by Petitioner

Counsel devotes three pages, 45 to 47, inclusive, to a discussion of this. It is simple enough. Article 8 of the Service Agreement required the War Shipping Administration to provide or procure insurance against all possible claims and to include the General Agent along with itself as a co-insured. R. 156, 157. The *war* P. & I. risks the War Shipping Administration carried itself, as is evident from Lt. Cmdr. Evans' letter (R. 147, 148). The *marine* P. & I. risks were insured with commercial underwriters. The War Shipping Administration, in doing this, used the underwriters formerly and customarily used by the agents in pursuance of the governmental policy, as expressed in the House Report as follows:

> "The Administrator, in the conduct of his duties and functions, makes very extensive use of the private organizations including those engaged in merchant marine insurance and related activities, steamship operators, stevedores, and terminal facilities, freight forwarders, and freight brokers and agents. Special skill, knowledge, and experience are made available in this manner for use in the integrated war effort." 1943 A.M.C. 614, 615.

The War Shipping Administration paid for all of this insurance. Consequently when Lt. Comdr. Evans determined, at least tentatively, that Hust's injury was not a war risk, but was an ordinary marine P. & I. risk, he quite naturally referred it to the agent, with instructions to take it up with its marine P. & I. underwriters from whom the government had bought the insurance. As the Oregon Court has pointed out, it was the agent's duty under the Service Agreement to adjust claims and to follow the instructions of the War Shipping Administration in doing so, and the correspondence on which counsel relies was merely a routine performance of that duty.

Counsel, in his brief at Page 45, says that the correspondence was not introduced as "an admission of liability", but rather to show "the practical construction" which the parties had placed on the Service Agreement. We think it shows a practical construction entirely in accord with our interpretation of that agreement.

In introducing, at the trial, the various items of so-called "evidence" discussed above, plaintiff's counsel was trying desperately to include something—anything at all—that would enable him to "get to the jury". But none of these, viewed in the light of the Service Agreement, the Statement of Policy and the Articles, is any evidence of employment at all. Each is plainly in accord with the functions of this respondent as a mere agent. We do not even have here a case of two equal inferences where "neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences against the other". Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 339. We do not, indeed, have any inferences at all. But if we did, they would have to give way before the plain, unambiguous documentary evidence of the Service Agreement, the Statement of Policy, and the Articles, signed by Hust himself. For as said in language quoted with approval by this Court in the Chamberlain case, supra: "It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences." 288 U.S. 341.

It is fortunate, we think, that these trifles may be eliminated. For it enables this Court to accomplish what we presume was its purpose in issuing the writ, namely, to decide for the country generally the

status of the seamen of the War Shipping Administration's fleet and the status of agents under the Administration's "Service Agreement".

NO PROOF OF RESPONDENT'S NEGLIGENCE

We have thus far discussed the question of employment; with especial reference to Hust's ineligibility to sue this respondent under the Jones Act. We come now to the second reason why the Oregon Court's judgment is correct, namely, there was no proof whatever of respondent's alleged negligence.

It will be conceded that the gravamen of actions under the Jones Act is negligence. *Seaboard Airline Ry. Co. v. Horton*, 233 U.S. 392, 501; and that the burden of proving this negligence is on the plaintiff. *Calmar Steamship Co. v. Taylor*, 92 Fed. (2d) 84, 86; *Cruse v. Sabine Transportation Co.*, 88 Fed. (2d) 298, 300; and that the evidence must be substantial; *Pennsylvania Ry. Co. v. Chamberlain*, supra, and *Chicago M. & St. P. R. Co. v. Coogan*, 271 U.S. 472, 478, and many *other cases in this Court.*

The only possible causes of the accident which the jury could have found were:

(a) A burnt out light bulb.

(b) Absence of the guard-chain around the hatch.

(c) Ordering plaintiff into the dark, unguarded place thus created.

All these things were responsibilities of the Master, "an agent and employee of the United States" who had "full control" over them. The defendant had nothing to do with them whatever. It did not own the ship or control it; or employ the crew, which was "subject only to the orders of the Master".

The bulb light was a part of the management of the ship—solely under the Captain's control. When it failed, another was immediately available. The ship was well supplied. There was merely a temporary failure in the *use* of its facilities; by the men responsible therefor—the Captain and his officers.

The same may be said of the guard-chain. It was removed by the Captain's own orders a day or two before the accident. R. 106. For some temporary use in connection with the towage. R. 83-84. Suitable rope was "readily" "available," which could have been placed on the stanchions around the hatch, as a substitute guard. R. 106. But the Captain did not have this done, until immediately after the accident, when he personally ordered it. R. 80.

As to the order to Hust to go into the hatch, certainly nothing need be said to show respondent's aloofness from it. "The officers and members of the crew shall be subject only to the orders of the Master." (Def's Ex. 21, R. at 151). And it is a fact that the order to Hust was given by the Boatswain in the presence and under the authority of the Master, R. 56.

No more need be said to show the complete lack of any evidence connecting respondent with the accident.

"It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding."

Chicago M. & St. P. R. Co. v. Coogan, 271 U.S. 472, 478; 70 L. Ed. 1041, 1045.

CONCLUSION

In this case we have relied on two points: Non-employment, and no negligence. As to both, there can be only one conclusion. Where, as here, the evidence is "so overwhelming on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury". *Gunning v. Cooley*, 281 U.S. 90, 94. Many cases in this Court have held the same. The judgment of the Oregon Supreme Court is therefore manifestly correct.

Indeed, the clear and thoughtful reasoning of the Oregon Court's opinion is, in itself, a complete justification of the judgment. This brief is merely complementary thereto, and presented to give this Court whatever assistance lies in our power.

It is suggested at the close of Petitioner's Reply Brief (on the application for the writ) that "this corporation" is attempting to escape liability by vir-

tue of the "ambiguous terminology" of the Service Agreement. This is strange, when we remember that elsewhere counsel speak of the "careful draftsmen who prepared this agreement", (Brief, P. 34). No, the agreement is not ambiguous. Nor is "this corporation" evading any of its responsibilities. At the behest of the government in time of war, it assumed certain limited duties under an agency contract, prepared by the government, and left its compensation entirely to the discretion of the government. All it asks now is that its duties and responsibilities be determined in accordance with that agreement, and that there be not forced upon it a status and a responsibility which neither it nor anyone else, in or out of the government, ever intended, and which would be outside of its agency and unjustified by any of the evidence in the case.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 625

CECIL I. HUST,
Petitioner and
Plaintiff-Respondent below,

v.

MOORE-McCORMACK LINES, INC.,
Respondent and
Defendant-Appellant below.

SECOND BRIEF OF RESPONDENT MOORE-McCORMACK LINES, INC., ON THE MERITS, PRINCIPALLY TO ANSWER QUESTIONS RAISED BY THE COURT ON THE ORAL ARGUMENT

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In the Supreme Court
of the United States

OCTOBER TERM, A. D. 1945

No. 625

CECIL I. HUST,
Petitioner and
Plaintiff-Respondent below,

v.

MOORE-McCORMACK LINES, INC.,
Respondent and
Defendant-Appellant below.

SECOND BRIEF OF RESPONDENT MOORE-McCORMACK LINES, INC., ON THE MERITS, PRINCIPALLY TO ANSWER QUESTIONS RAISED BY THE COURT ON THE ORAL ARGUMENT

Since this brief is written under pressure of time, we shall not attempt to answer every point made in Petitioner's Reply Brief, nor in the briefs of the amici. Most of those points have been already covered in our briefs already filed, and as to others the answers are obvious. If any require attention we shall notice them. But this brief is, in the main, directed to answering the specific points raised by the Court at the last oral argument.

FIRST: AUTHORITY OF WAR SHIPPING ADMINISTRATION TO OPERATE VESSELS AND TO CONTRACT FOR SERVICES OF GENERAL AGENTS UNDER G.A.A. FORM OF CONTRACT.

We believe the authority of the W.S.A., an emergency war-time office of the Executive Office of the President to operate vessels and contract for services of general agents, has not heretofore been questioned.

The W.S.A. was created February 7, 1942, two months after Pearl Harbor, by Executive Order of the President, acting by virtue of his authority as President and Commander in Chief of the Army and Navy. Executive Order 9054, Feb. 7, 1942, Amended by Executive Order 9244, Sept. 16, 1942.

Section 3 of Executive Order 9054 provided that

> "The functions, duties, and powers conferred by law upon the United States Maritime Commission *with respect to the operation . . . . of vessels . . . .* under (citing various Acts and Executive orders) and under any other provisions of law, including Executive Orders, *are hereby transferred to the Administrator.*"

Also under Section 2(i), with respect to all matters for which the Administrator was responsible, he was given the authority with respect to contracts, conferred by Executive Orders 9001, 9127, and § 403 of the Public Law 528, 77th Congress.

We shall now summarize the sources of the au-

thority which was thus transferred to the War Shipping Administrator.

The powers of the Maritime Commission under the Merchant Marine Acts of 1920 and 1936, with respect to the operation of vessels, are well known to the Court. More important are the following sections:

Merchant Marine Act, 1920, as amended, Section 7, which authorized the United States Shipping Board first to *sell* vessels, and if unable to sell, to *charter*, and if unable to make a satisfactory sale or charter, to *operate* vessels;

Merchant Marine Act, 1920, as amended, Section 12, providing "That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise . . . .";

Merchant Marine Act, 1936, as amended, Section 204, which transferred powers of the Shipping Board to the Maritime Commission;

Merchant Marine Act, 1936, as amended, Sections 704, 705, 706(a), and 707(c).

These provide for chartering vessels to private operators, and permit operation of vessels for account of the Commission by private operators on a temporary basis, such operation to be discontinued after one year. Section 707(c) permits temporary operation by the Commission pending a readvertisement for bids for charter.

Now, it will be observed that under these Acts, the national policy was for private operation and opposed to the government keeping in the business of operating ships. The powers of the Commission to operate ships were, therefone, quite limited.

However, two other sections of the Merchant Marine Act of 1936 are of special importance:

Section 902, relating to purchase or requisition of vessels, is applicable only during a national emergency.

Paragraph (e) of this section authorizes the Commission to "repair, recondition, reconstruct, *and operate*, or charter for operation, any property acquired under authority of this section."

This authority became applicable upon the President's declaration of a national emergency.

Most important on the authority to contract is Section 207 (as amended by Act of June 23, 1938) which provides:

> "The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, ... , *in the same manner that a private corporation may contract* within the scope of the authority conferred by its charter."

This section further provides that the General Accounting Office shall in its audits "allow credit for all expenditures shown to be necessary because of the na-

ture of such authorized activities, *notwithstanding any existing statutory provision to the contrary.*"

This provision is of special importance because it became applicable to the greatly expanded powers of the Commission under emergency legislation and executive orders.

We shall now enumerate, chronologically, the emergency statutes and executive orders which, for the national defense, greatly increased the authority of the Maritime Commission and transferred it to the War Shipping Administrator.

Public Law 5 (Joint Resolution) 77th Congress, Approved February 6, 1941.

This Act appropriated $350,000,000 to the construction fund of the Maritime Commission primarily for construction of ocean cargo vessels of a type useful in time of emergency. Section 2 made the important provisions of § 207 of the Merchant Marine Act of 1936 (authority to make contracts in same manner as a private corporation) applicable to all activities under Public Law 5. It further authorized the Commission to carry on these activities "without regard to the provisions of Section 355,[1] 3648,[2] and 3709[3] of the Revised Statutes of the United States."

Public Law 101, 77th Congress, Approved June 6, 1941.

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[1]Requiring Attorney General's opinion before purchasing land.
[2]Prohibiting advance payments from public funds.
[3]Requiring advertisement of government contracts.

Section 1 authorized requisition of idle foreign ships in U. S. ports. Section 3(a) authorized the Commission, during the emergency,[1] to *charter any* vessel necessary for the transportation of commodities essential to national defense, notwithstanding any other provision of law, and without regard to Section 3709[2] of the Revised Statutes. Section 4 gives the same authority to *purchase any vessel.*

It then provides:

> "*Such vessels* and *vessels otherwise acquired* by *or made available* to the Commission may be chartered . . . *or operated by the Commission upon such terms and conditions as it may deem desirable and in the public interest,* giving primary consideration to the needs of national defense."

Here is clear authority in broad terms for the Maritime Commission (and later the W.S.A.) to itself operate ships for the national defense on any terms and conditions which it deemed desirable and in the interest of the national defense.

Public Law 247, 77th Congress, approved August 25, 1941, is also very important. This Act should be considered in connection with Public Law 5 previously enacted by the same Congress, and referred to above. Public Law 5 was primarily an emergency ship *construction* act. Public Law 247 increased the appropriation by $698,650,000, to be used for the same pur-

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[1]The original time limitation of June 30, 1942, was extended until after the war by Public Law 610, 77th Congress, June 16, 1942.

[2]Requiring advertisement of government contracts.

poses as Public Law 5, but also:

> "And (4) the purchase, requisition, charter, *operation*, repair, reconstruction, and reconditioning of vessels acquired, or the use or possession of which is acquired by the Act of June 6, 1941 (Public Law 101), *or otherwise*."

Following Pearl Harbor, the Congress passed the First War Powers Act, 1941 (Public Law 354, 77th Congress) approved December 18, 1941.

Section 201 of this Act authorized the President to remove all restrictions on the making of contracts, except for a prohibition against cost-plus-a-percentage-of-cost contracts, and except for laws limiting profits.

The President promptly exercised this authority by issuing the very important Executive Order 9001, December 27, 1941. Title I of this Order is as follows:

> "1. By virtue of the authority in me vested by the Act of Congress, entitled 'An Act to expedite the prosecution of the War effort', approved December 18, 1941 (hereinafter called 'the Act'), and as President of the United States and Commander In Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating

to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or Navy Department or the United States Maritime Commission. The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and the Navy Departments, and the United States Maritime Commission.

"2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders or otherwise), for all types and kinds of things and services necessary, appropriate, or convenient for the prosecution of war, or for the invention, development, or production of, or research concerning any such things, including but not limited to aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies facilities, utilities, machinery, machine tools, and any other equipment, without any restriction of any kind, either as to type, character, location or form.

"3. The War Department, the Navy Department, and the United States Martime Commission may, by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any per centum of the contract price, and may enter into agree-

ments with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract should have accomplished hereunder, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract, or the amendments or modifications thereof.

"4. Advertising competitive bidding, and bid, payment, performance or other bonds or other forms of security, need not be required."

It may be observed that the Maritime Commission was the only civilian agency of the government to be granted this extraordinary authority along with the Army and Navy.

The Attorney General discussed the legislative history of the contract provisions of the First War Powers Act in an opinion to the Secretary of War, August 29, 1942, and pointed out that members of Congress intended the Act to remove every possible limitation on the making of contracts, except that it prohibited cost-plus-a-percentage-of-cost contracts.

Now all of these powers and authority were transferred to the War Shipping Administrator under the President's Executive Order 9054, (amended by 9244),

referred to above.

> "The functions, duties, and powers conferred by law upon the United States Maritime Commission *with respect to the operation . . . of vessels* . . . . are hereby transferred to the Administrator."

Thus the War Shipping Administrator, by this series of emergency acts and executive orders, was given the broadest powers to operate ships and make contracts relating thereto. The history and development of this authority show recognition by the Congress and the President that, for the national defense during the emergency, operation of ships by the government was a necessity. The peace time policy in favor of private operation had to be temporarily abandoned in the interest of the national defense.

The G.A.A. form of agreement, dated April 4, 1942, was drafted by the legal staff of the W.S.A. in the early months of the war. We believe that it was intended to, *and did,* retain full control over the operation of the vessels, and particularly over the master, officers, and crew, in the War Shipping Administration, but utilized the experience of the steamship companies for storing and supplying the vessels, and keeping the accounts of the business of the vessels, as set forth in the agreement itself.

This arrangement for operation of the ships was well known to everyone from the start. The G.A.A. form of contract was published in the Federal Register, and Congress, the W.S.A., the unions, and the

steamship companies, all considered the seamen to be employees of the government. Article 3A(d) was incorporated into the Statements of Policy, and into the union booklets (Petitioner's Exhibit 15).

Congress knew the method of operation and repeatedly approved it.

In the Appropriation Act for the fiscal year ending June 30, 1943 (Public Law 678, 77th Congress, Approved July 25, 1942), the War Shipping Administration's fund was increased $1,100,000,000 for carrying on its functions, "including costs incidental to the acquisition, operation, loading, discharging, and use of vessels transferred for use of any department or agency of the United States." A good many vessels, including many troop transports, were operated by W. S. A., utilizing services of general agents under G.A.A. agreements, on direct assignment to the Army and Navy,[1] and the quoted provision was for the purpose of authorizing payment of costs of operation of these vessels, which otherwise might have been chargeable to Army and Navy appropriations.

The Appropriations Act for the fiscal year ending June 30, 1944, increased the fund by $2,200,000,000 for the same purposes.

Public Law 17 also shows recognition and ap-

[1]See the reference to this in Public Law 17—"The term 'seaman' shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the U. S."

proval by Congress of the method of operation by W.S.A.

This Act, as pointed out elsewhere, repeatedly refers to "officers and members of crews employed as employees of the United States through the War Shipping Administration."

We hope your Honors will read the full House Report on Public Law 17. However, the following excerpts from the House and Senate Reports show complete understanding and approval by Congress of W.S.A.'s operation of the vessels.

From House Report No. 107, 78th Congress, 1st Session, to accompany H.R. 133:

> "This legislation must be considered in the light of the tremendous scope and magnitude of the operations of the War Shipping Administration. The War Shipping Administration is actively engaged in operating what is destined to be the largest merchant marine in the world's history." (Page 12).
>
> "It has become trite to say that this is a war of transportation, since ocean transportation is a limiting factor which will determine the amount of supplies and number of troops that can be transported to the many theaters of active combat. The functions of the Administrator therefore with respect to the operation and control of the American merchant marine and the coordination of its activities with those of our allies constitute one of the most vital civilian activities of the war effort, if indeed it is not the most vital. The activities are so broad and manifold, and the need for efficient emergency action so great, that

the Administrator cannot function with the usual restrictions applicable to Government agencies.

"In section 207 of the Merchant Marine Act, 1936, Congress provided that the Maritime Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. The Administrator, War Shipping Administration, in exercising his functions, duties, and powers operates with like authority under these provisions of the Merchant Marine Act, 1936, and other applicable laws." (Page 13).

"The vessels owned by the War Shipping Administration or under bareboat charter to it are operated by experienced steamship companies as general agents for the Administrator. The agreements between the Administrator and the general agents specifically provide that the general agent shall procure and make available officers and crews for War Shipping Administration vessels 'through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time.'

"The intention of this provision is to authorize the general agent to procure his seagoing personnel through his customary channels in cases where the general agent had previously operated under union contracts. This provision also avoids favoritism as to conditions between one general agent and another or as between one union and another.

"Shortly after the appointment of the Administrator, he adopted a statement of labor policy in which he specifically provided that 'the provisions of the existing collective bargaining agreements be continued and observed unless changed by mutual agreement.' Accordingly, the seamen employed by the War Shipping Administration through its general agents are entitled to all of the contractual rights of seamen on commercial vessels, including overtime compensation, right to settle disputes through arbitration, special bonuses and penalty provisions, and so forth. By this means, there has been preserved existing labor structures which have been built up in a process of experimentation and evolution, and there has been maintained and utilized for the war effort the experience of responsible organizations and leadership. Although employees of the Government, these seamen are paid by the general agents directly in the same manner as payment is made in commercial operations, the funds for such payment having been lodged in bank accounts maintained by the general agents out of revenues received from the operation or from advances made by the Administrator." (pp. 16, 17).

And from Senate Report No. 62, 78th Congress, Calendar No. 57, to accompany H.R. 133:

"The vessels owned by the War Shipping Administration or under bare-boat charter to it are operated by experienced steamship companies as general agents for the Administrator under supervision and direction of the Administrator's staff which includes many officials drawn from the industry. The agreements between the Administrator and the general agents specifically provide that the general agent shall procure and make available officers and crews for War Shipping Administration vessels—

through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time.

The intention of this provision is to authorize the general agent to procure his seagoing personnel through his customary channels in cases where the general agent had previously operated under union contracts. This provision also avoids favoritism as to conditions between one general agent and another or as between one union and another.

"In the exercise of its various functions and in the conduct of its activities, the War Shipping Administration in general is authorized to operate with the powers of a business or a commercial organization under the provisions of the Merchant Marine Act, 1936. These activities are so broad and so manifold and the need for emergency action is so great that the Administrator cannot function with the usual restrictions applicable to Government agencies." (Page 4).

We think it abundantly clear from the foregoing that the War Shipping Administrator had authority to operate vessels and enter into general agency agreements, and that the entire arrangement, including the general agency agreement, the method of employing crews, and the fact that the crews were employees of the United States, was recognized and approved by Congress.

We add the thought, however, that even if the W.S.A. had acted *ultra vires*, that fact would not make respondent, who undertook its duties under the general agency agreement in good faith, an employer of the crew.

SECOND: THE LEGISLATIVE HISTORY OF PUBLIC LAW 17 SHOWS THAT CONGRESS CONSIDERED THE SEAMEN TO BE GOVERNMENT EMPLOYEES AND CONSIDERED AND REJECTED A PROPOSAL FOR JURY TRIAL OF INJURY SUITS.

This is the point that Mr. Justice Reed asked us to cover.

Public Law 17 (sometimes known as the Merchant Marine Omnibus Bill or the War Shipping Administration Clarification Act) was first introduced in the 77th Congress, 2nd Session, as H.R. 7424. Hearings were held by the Committee on Merchant Marine and Fisheries on September 2, 1942. The bill was favorably reported by this Committee (H. Report. No. 2572, 77th Congress, 2nd Session), was passed by the House, and was favorably reported by the Senate Committee on Commerce (Senate Report, No. 1655, 77th Congress 2nd Session). Congress adjourned before the bill could be passed, and it was reintroduced in the 78th Congress, 1st Session, as H.R. 133. The House report (Report No. 107, 78th Congress, 1st Session) and Senate report (Report No. 62, 78th Congress, 1st Session) on H.R. 133 incorporate most of their previous reports on H.R. 7424.

Included in the reports are communications from the Federal Security Agency (House Report No. 107, page 32), the U. S. Employees' Compensation Com-

mission (page 33), the U. S. Civil Service Commission (page 38), and the Treasury Department (page 39). All of these show a general understanding on the part of these other government agencies that the seamen were employed by the W.S.A. as government employees, and that they were not private employees.

Before discussing the jury trial issue which arose in the consideration of Public Law 17, we make some general observations on seamen's rights for injuries as they existed *prior* to Public Law 17.

A seaman injured on a privately owned ship has the right to maintenance and cure, and the right to indemnity for unseaworthiness, and also the right to damages for negligence of his employer under the Jones Act.

All of these rights could be enforced in admiralty proceedings, and the right to damages under the Jones Act could be enforced at law with trial by jury.

Now, in the case of a seaman employed on a *merchant* vessel of the United States (as distinguished from a public vessel) he had the same *substantive* rights, including those under the Jones Act, but they could only be *enforced* under the Suits in Admiralty Act, because that was the only procedure by which the sovereign had consented to be sued.

Public Law 17 did not change any of these rights. All it did was (1) to extend the *same* rights of seamen on *merchant* vessels of the United States to seamen on *public* vessels of the United States, and (2)

to require administrative disallowance of the claim before filing suit, in order "to prevent unnecessary or premature litigation against the United States." (House Report, p. 21).

Therefore, we do not claim that Public Law 17 took away any rights of seamen in this respect. Both before and after Public Law 17, seamen employed by private employers could sue their employer under the Jones Act either by an *in personam* proceeding in admiralty, or by an action at law with a jury trial. And seamen who were employees of the government on merchant vessels could enforce their substantive rights under the Jones Act only under the Suits in Admiralty Act.

Petitioner's desire to bring his case before a jury, rather than proceed against the United States as his employer in the Admiralty Courts (historically the guardians of the rights of seamen) under the Suits in Admiralty Act, is the only reason for this case being before this Court, for the entire cost of the judgment is born by the United States in either event.

The reports on Public Law 17 show that Congress considered but rejected the jury trial remedy.

At the hearings before the House Committee on Merchant Marine and Fisheries on H.R. 7424, on September 2, 1942, Mr. Haddock, legislative representative, C.I.O. Maritime Committee, presented a statement by Mr. William L. Standard (who has filed brief *amicus curiae* in this case) in behalf of the Na-

tional Maritime Union. It is set forth in full in the report of the Hearings at pages 30-32 inc.

This statement recognizes that seamen employed on vessels operated by the WSA are government employees. Discussing the exclusion of these seamen from the U. S. Employer's Compensation Act, he says "insofar as they were employees of the government." He points out that the seamen through their unions have consistently opposed a Compensation Act, preferring their rights under existing laws.

He then objects to seamen being deprived of a jury trial, and makes this recommendation:

> "The N. M. U., therefore, recommends that, in order that merchant seamen employed by the War Shipping Administration, should not be deprived of a trial by jury, after the word 'Act,' at line 11, page 2, of the bill, the following be inserted:
>
> "'*Provided, however*, That the claimant may, at his election, maintain an action for damages at law, with the right of a trial by jury, and in such action the claimant may enjoy the same rights, benefits, exemptions, privileges, and liabilities of seamen employed on privately owned and operated vessels.'
>
> "To deprive merchant seamen employed on vessels operated by the War Shipping Administion of the benefit of a trial by jury would be depriving them of a very substantial right."

We are not certain whether Mr. Standard fully understood the provisions of Public Law 17. Part of his statement seems to indicate that he thought Public Law 17 was going to take away a right to jury

trial that then existed. But, as we have said, Public Law 17 took away no right of jury trial against the government, because prior to Public Law 17 no such right existed. And of course Public Law 17 did not purport to take away a right of jury trial against a *private* employer, as, for example, the case of a private owner operating his own vessel, and manning it, under *time charter*.

In any event, Mr. Standard's statement to the Committee directly raised the issue of whether a jury trial should be permitted in the case of seamen injured while employed by the War Shipping Administration.

The Attorney General, Mr. Biddle, took notice of this issue, and gave his views to the Committee in a letter dated September 14, 1942. This letter is printed at page 33 of the Report of the Hearings, Sept. 2, 1942, on H.R. 7424. It is also set forth at page 30 of Mr. Axtell's brief *amicus curiae*.

We quote here only the first two paragraphs:

> "My Dear Mr. Bland: At the hearing, September 2, 1942, on H.R. 7424 the suggestion was presented on behalf of the National Maritime Union that an action at law with jury trial should be afforded seamen where claims are asserted against the United States on account of death, injuries, illness, loss of effects, detention, or repatriation.
>
> "I have no wish to oppose jury trial in these cases if to the Congress the adoption of such a policy seems wise. There are certain considerations which I think should be taken into account

in reaching your conclusion on the issue of policy involved."

The Attorney General then discusses four considerations against jury trials in these cases.

The House Committee considered the matter, and the Attorney General's views prevailed. We quote from the Committee's Report (House Report 107, 78th Congress, 1st Session) at page 21,

> "The various rights and remedies under statute and general maritime law with respect to death, injury, illness and other casualty to seamen, have been rather fully set forth herein above. Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States. *In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942).*" (Emphasis supplied.)

Thus Congress considered whether a jury trial should be afforded to seamen employed by the War Shipping Administration, and rejected such procedure for the reasons given by the Attorney General.

Public Law 17—Social Security Tax

Before leaving Public Law 17, we answer briefly a contention made by counsel with respect to social security deductions. They argue that since social security deductions were taken from Hust's pay, he was a private employee, because, they say, no deduction could be taken if he were a government employee, since government employees are not subject to the Social Security Act (Petitioner's Reply Brief on Merits, page 33; Mr. Feeman's Brief, page 10.)

This completely overlooks Section (b) (2) of Public Law 17, which *amended* the Social Security Act so as to include services performed "on or in connection with any vessel by *an officer or member of the crew as an employee of the United States employed through the War Shipping Administration.*" The amendment is made retroactive to Sept. 30, 1941.

See also House Report 107, 78th Congress, 1st Session, on H.R. 133 at page 20, where it is explained that in some cases the deductions had been taken during the past period, and where the Committee points out the desirability of applying the Social Security Act on "bareboated or owned vessels on which the seamen became employees of the United States."

In fact, if the seamen in these cases *were* private employees, as petitioner contends, they would have been subject to the Social Security Act and no legislation on this point would have been necessary. The very fact that Congress, in Public Law 17, thought it necessary to amend the Social Security Act, shows that Congress recognized them as government employees.

THIRD: SINCE THE SHIPPING ARTICLES ARE STATUTORY IN FORM AND ARE ALWAYS SIGNED BETWEEN THE MASTER AND CREW, WHY IS IT SIGNIFICANT THAT THEY WERE SO SIGNED IN THIS CASE? DOES SUCH A SIGNING THROW ANY LIGHT ON THE QUESTION WHETHER THE CREW WERE EMPLOYEES OF THE UNITED STATES?

The requirement of Shipping Articles goes way back to the Act of July 20, 1790. Their purpose was to give certainty to the seaman's contract of employment. The master, in engaging the seamen, acted, and has always acted, for the *owner* of the ship. Sometimes he was an owner or part-owner himself. Mr. Justice Storey, while on circuit, said, in U. S. v. Haines, 5 Mason's Reports, 272, at 275, that the Shipping Articles are "a contract between the seaman and the *owner* through the instrumentality of the master, as agent of the *owner*". (Throughout this brief italics are ours.)

When we said in our previous brief that the crew of this ship, the MARK HANNA, were employees of the United States because they were engaged by the master, likewise an employee of the United States, we had in mind, of course, that the United States was the *owner* of this ship, and that the master was engaging the men for such *owner*.

So that the significant fact attaching to these Articles is that they were between the master, acting for his principal, the *owner of the ship*, on the one side, and the crew on the other.

Indeed, our opponents do not contest the fact that the master, in signing on the crew, engages them for the owner. Our opponents recognize this. As indeed they must. But, forced into this corner, they attempt to escape by a claim that the Agent here was an owner pro hac vice. That claim is refuted by the very title itself of the Agreement, of which Mr. Justice Burton took note at the oral argument. That title is: "Service Agreement for Vessels of Which the War Shipping Administration is Owner or Owner Pro Hac Vice" R. 150. It is obvious that the War Shipping Administration and the Agent cannot *both* be owners pro hac vice on the same ship. And since the Agent's duties are identical under this standard form of agreement, whether the ship be owned outright by the War Shipping Administration or merely owned pro hac vice, it follows that in the case of the ship owned outright, the Agent is still merely an agent. In this very case, both kinds of ships were allocated to the Agent under this one Agreement. Can it be said that as to those owned by the United States pro hac vice, the Agent was a mere agent, but as to the others it was itself an owner pro hac vice? When it performed the identical duties for each? These questions answer themselves.

But we do not need to rely on this title. There are much stronger reasons why the Agent here is not an owner pro hac vice.

In the first place, let us observe that in all the decisions in all the courts which have considered this question, it is always a *charter* which is involved. And the question is always whether the charter is a *letting* or a *hiring,* in the sense of a *demise,* or whether it is a mere contract of affreightment. We do not believe that it has ever been contended, and certainly never decided, that a mere Agency Agreement like this is a demise constituting the Agent an owner pro hac vice.

It is an absolute essential of an ownership pro hac vice that the alleged owner be in sole and *exclusive possession, command* and *control* of the ship. This has been stated by this Honorable Court from the earliest times, and has been consistently adhered to. Thus, in Marcardier v. The Chesapeake Insurance Co., 3 L. Ed. 481, at 484, Mr. Justice Storey said:

> "A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the *exclusive possession, command* and *navigation* of the ship. . . . But where the general owner retains the *possession, command* and *navigation* of the ship, and contracts to carry a cargo or freight for the voyage, the charter party is considered a mere affreightment sounding in covenant and the freighter is not clothed with the character or legal responsibility of ownership."

He held that there was no ownership pro hac vice.

And in Reed v. U. S., 20 L. Ed. 220, Mr. Justice Clifford said:

"Affreightment contracts are of two kinds, and they differ from each other very widely in their nature as well as in their terms and legal effect.

"Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed with the character of legal responsibility of ownership. *Donahue v. Kettell*, 1 Cliff. 137; *The Volunteer*, 1 Sumn. 551; *Drinkwater v. The Spartan*, 1 Ware 153; *Gracie v. Palmer*, 8 Wheat. 605; *Clarkson v. Edes*, 4 Cow. 470; *Taggard v. Loring*, 16 Mass. 336; *Christie v. Lewis*, 2 Brod. & B. 410.

"Unless the ship herself is let to hire, and the owner parts with the possession, command and navigation of the same, the charterer or freighter is not to be regarded as the owner for the voyage, as the master, while the owner retains the possession, command and navigation of the ship, is the agent of the general owner, and the mariners are regarded as in his employment, and he is responsible for their conduct. *Putnam v. Wood*, 3 Mass. 481.

"Courts of justice are not inclined to regard the contract as a demise of the ship if the end in

view can conveniently be accomplished without the transfer of the vessel to the charterer, but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command and navigation of the ship, the hirer becomes the owner during the term of the contract, and if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts."

The decision was that there was no ownership pro hac vice.

Again in Leary v. U. S., 20 L. Ed. 756, Mr. Justice Field said:

"There is no doubt that under some forms of a charterparty the charterer becomes the owner of the vessel chartered for the voyage or service stipulated and, consequently, becomes subject to the duties and responsibilities of ownership. Whether in any particular case such result follows must depend upon the terms of the charter-party considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated is, in all cases, one of construction. If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case, the charter-party is a contract for the lease of the vessel; in the other,

it is a contract for a special service to be rendered by the owner of the vessel.

"In examining the adjudged cases on this subject we find some differences of opinion, especially in the earlier cases, as to the effect to be given to certain technical terms used in the charter-party in determining whether the instrument parts with the entire possession and control of the vessel, but no difference as to the rule of law applicable when the construction is settled. All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession and control is incompatible with the existence at the same time of such special ownership in the charterer."

Here again, as in the previous cases, it was held that there was no demise.

So, again in U. S. v. Shea, 38 L. Ed. 403, the same principles are again stated. The court held here that it *was* a case of hiring,—in other words, a demise, but did so on the express ground that the *exclusive possession, management* and *control* was in the hirer, —in this case the quartermaster's department of the army. The facts were that Shea furnished some boats to the army to run between New York and Governor's Island, and New York and Sandy Hook, and agreed to furnish an engineer and firemen, and if requested, to furnish the remainder of the crew. But he retained no control over them, and the case turned on this finding of fact: "During the term of its use it

was under the exclusive management and control of the defendants. The very condition resulted which is the purpose and effect of a demise—the transfer of the *exclusive possession, management* and *control.*" (Bottom Page 407). The court even repeats this statement on Page 408, saying that "it was wholly in the management and control of the quartermaster department", and again "under the exclusive management and control of the quartermaster's department at the time of the accident". This case is cited by opponents, but it will be seen that it entirely supports our contention that to constitute one an owner pro hac vice he must be in *exclusive management, possession* and *control* of the ship. It must, in effect, be a complete demise.

Opponents cite the Barnstable, 45 L. Ed. 954. The case does not really discuss ownership pro hac vice, nor even use that term. As stated by the court:

> "The question involved in this case is, whether the owners of a vessel, who have let it out upon charter-party and agreed to pay 'for the insurance on the vessel,' are liable, as between themselves and the charterers, for damage done to another vessel by a collision resulting from the negligence of the officers and crew, who are appointed and paid by the charters.

The Court said:

> "As the charterers hired the Barnstable for a definite period, and agreed to select their own officers and crew, and pay all the running current expenses of the vessel, including the expense of loading and discharging cargoes,—the owners

> only assuming to deliver the vessel to the charterers in good order and condition, and to maintain her in efficient state during the existence of the charter party,—there can be no doubt that, irrespective of any special provision to the contrary, the charterers would be liable for the consequences of negligence in her navigation, and would be bound to return the steamer to her owners free from any lien of their own contracting, or caused by their own fault."

The decision was that the primary liability for the damage to the other ship rested on the charterers, since they had selected and hired the crew and were in complete possession and control, and not on the owners. The decision therefore really supports us.

One more in point, however, is New Orleans-Belize Etc. SS Co. v. U. S., 60 L. Ed. 227. The vessel was chartered by the United States for military purposes in connection with operations around Cuba during the Spanish War. She suffered injuries due to storm and collision. Her owner sued the United States for the damage. The charterparty said that the owner "does hereby grant and let", and a quartermaster of the army "does hereby take" the vessel for certain voyages, and for such longer time as the army might require. Other provisions of the charter are stated in the opinion. Mr. Justice Holmes said:

> "The main contest is upon the question whether by this contract the United States became owner pro hac vice, as affecting the extent of the liability assumed. The claimant relies upon the words 'grant and let' on the one side and 'take' on the other, the fixing of the price at which the United

States may purchase the vessel, the reference to the vessel being 'returned', the contemplation that the need of repairs may be attributable to the fault of the United States, the control of the United States over the destination of the ship, and some details, as showing that the United States was in the place of the owner for the time. But we cannot accept this conclusion. The general owner furnished the crew and a master who at least regarded himself as representing its interests, since he protested against commands that he received. It agreed to deliver the cargo in good condition, dangers of the sea, etc., excepted. It assumed the marine risk. We deem it plain that the control and navigation of the vessel remained with the general owner, although the directions in which it should proceed were determined by the United States. . . . ."

The decision was that there was no demise,—that the United States was not an owner pro hac vice. Please note that the decision was against ownership pro hac vice, even though the charter contained the words "grant" and "let", on the one side, and "take" on the other, and provided that at the conclusion of the charter the vessel should be "returned",—all of which refutes counsel's argument that the words "assume control" and "custody" and "turned over", in Articles 11 and 12 of the Agreement, indicate an ownership pro hac vice. (Parenthetically, we may interject here that the language in Article 12 is not that all vessels in the custody of the General Agent shall be turned over but it is that "all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this Agreement shall be immediately turned over to the United States". We suggest that

the word "custody" does not qualify the word "vessels", but rather qualifies the words "property of whatsoever kind", such as books of account, moneys, shore supplies and spare parts for vessels and all the innumerable things that such an agent would be keeping in its storehouses for its principal.)

To return, however, to ownership pro hac vice, we have shown from the many decisions of this Court that to constitute such an owner, he must have *exclusive* and *entire command, possession* and *control* over the vessel, including her *navigation*. Bearing in mind these principles, it surely requires no close analysis of the present Agreement to show that it has none of the characteristics of an ownership pro hac vice. It is not a demise. It does not "let" or "hire" the vessel; nor does the Agent "take" the vessel. There is no stipulated rent or charter-hire; the Agent does not pay the United States anything for the vessel. On the contrary, the United States pays the Agent for its services, the amount thereof being left to the discretion of the Administrator. The Agent cannot select the freighters and shippers with whom he would deal; nor the cargoes; nor the voyages; nor the loading berths; nor the stevedores (stevedoring services are performed under a master contract between the stevedore and the War Shipping Administration). The Agent cannot select the master. All it can do is procure one and produce him for the United States to pass on and reject or accept. The Agent cannot hire the crew. He cannot even "procure" the crew for the

master to engage, except as he does it through the "usual channels", i e., the union halls. If the ship performs a salvage service, the Agent can have nothing to do with it and gets no award. Article 10. Indeed, the Agent has no financial interest in the venture at all. None of the vessel's revenue goes to him. He gets some flat fees, variable in the discretion of the Administrator, but which the Administrator prescribed in General Orders 12 and 34 hereafter adverted to. The Agent can hardly turn a hand except as he is "directed" or "ordered" or "instructed" by the Administrator. The practice of the Agent, under this Agreement, is described by Tripp at R. pages 115-119.

With these preliminaries, let us look a little more closely at the Agreement, clause by clause.

Article 1. The Agent is appointed as an agent and not as an independent contractor to manage and conduct the *business* of the vessels. (Note that he does not manage the *vessels* as in some previous agency agreements; he only manages their *business*. The management of the *vessel* is left to the master. Article 3A(d)). Cf. Tripp R. 117, 124, 125.

Article 2. The Agent accepts the appointment. But look how he is circumscribed. He must act only "in accordance with such directions, orders or regulations as the latter (United States) has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided".

Article 3A. The Agent shall to the best of its ability, *but for the account of the United States*, maintain the vessels in trades or services. But what trades or services? In such as the Agent may select? No. Such as "the United States may direct". Can the Agent select voyages, cargo, etc? No. It must act "subject to its (the United States) orders as to voyages, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels". (In the absence of such orders he may follow reasonable, commercial practices.)

Article 3A(c). "Equip, victual, supply and maintain the vessels subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe". If the Agent were an owner pro hac vice, it would be no concern of the United States *how* the agent equipped, victualed or supplied the vessels. The United States would have no interest.

Article 3A(d). We have discussed this fully before. We do not repeat that discussion here. We merely say that the whole clause is entirely incompatible with the idea that the Agent is owner pro hac vice with "*exclusive possession, command* and *control*" of the ship and her *navigation*, as the decisions specify. "Full control, responsibility and authority with respect to the navigation and management of the vessel" is in the master,—"an agent and employee of the United States". The Agent does not hire him;

he merely procures him. The United States may accept or reject him. If the United States accepts him, he is hired by the United States, and in turn hires the crew. We have already shown how little the Agent has to do with this. Cf. too Tripp's testimony, R. 119.

Article 3A(e). We do not quote it. A reading of it will show that an Agent cannot even issue the kind of bill of lading he might choose. The form is dictated by the United States.

Article 5 is the one relating to compensation for the Agent's services. He has no assurance of any; other than it must be "fair and reasonable".

Article 9 relates to general average. Here again the General Agent must "comply with all instructions issued by the United States", etc.

Article 10 concerns salvage. We have already noted it. If the Agent were an owner pro hac vice, he certainly would be entitled to salvage. For if he is going to have the liabilities of an owner, he should have its benefits. But here again, as elswhere through the Agreement, everything is under the "control of the United States".

Article 16(d) is interesting. For if the Agent were an owner pro hac vice, (the commonest form of which is a bareboat charter or a demise), it would be a matter of complete indifference to the general owner whether the Agent obtained officers or crews for the operation of the vessels or not. They could lie idle for all the general owner would care. But this

Article takes care to provide that the General Agent shall not be liable to the United States for any failure to obtain officers or crews for the operation of the vessels caused by strikes, lockouts, labor shortages, etc.

We think we have said enough, and more than enough to show that there is here no ownership pro hac vice; consequently, that the Agent, since it is neither a general owner nor an owner pro hac vice, cannot possibly be regarded as the employer of crews.

We do not stop to discuss the cases in the lower courts cited by counsel. Such, for example, as the Del Norte and the Charlotte and others. An examination of them will show that in each case the charterer (not a mere agent, mind you) had complete command, possession and control of the boat. They are, moreover, all unusual cases, like a yacht, for example. They are not in the ordinary run of commercial business. In such a business practically the only arrangement resulting in ownership pro hac vice is the typical bareboat charter.

A time-charterer has infinitely more control over a vessel than does the Agent here. In an ordinary time-charter, the charterer has the full use of the vessel; loads her with whatever kinds of cargo he wants; for whatever rates of freight he can get; loads and discharges her where and as he pleases (subject only to the master's supervision with respect to the safety and seaworthiness of the ship); sends her on

whatever voyages he wants to, within the designated trading limits; requires the master to sign bills of lading in whatever form and at whatever rate of freight the charterer chooses (without prejudice, of course, to the charterparty); may load the ship entirely with his own cargo or treat her as a general ship and carry the cargo of other shippers for hire,—and yet, in spite of all these acts of control, he is not an owner pro hac vice, and the master and the crews are not his employees, but remain the employees of the general owner.

If this Court, in order to give petitioner Hust the right to a jury trial against this Agent, should hold that this Agency Agreement made the Agent an owner pro hac vice, and thus an employer of Hust, we submit it would go very far beyond anything hitherto ever considered.

Finally, we suggest that a seaman is entitled to know clearly, and without doubt, *who* his employer is. That employer has always been the owner, either actual or *pro hac vice*. Now, for the first time in history, to declare a mere agent like this an "owner" and therefore an employer of the crew, would create nothing but doubt and confusion in the minds of seamen, owners, agents and everybody else. For in all future agency agreements the question would arise: Who *is* the employer? And in this uncertainty no one would fare worse than the seamen themselves.

FOURTH: WHAT DOES THE AGENT NOT DO UNDER THE PRESENT AGENCY AGREEMENT THAT HE DID (a) IN PRIVATE OPERATION OF HIS OWN SHIPS, OR (b) IN THE OPERATION OF GOVERNMENT SHIPS UNDER FORMER OPERATING AGREEMENTS? AND WHAT WAS THE AGENT'S COMPENSATION UNDER THE PRESENT AGREEMENT?

These questions were suggested by Mr. Justice Black and we shall attempt to answer them. We are not quite certain, however, whether Mr. Justice Black wished us to contrast the functions of the Agent under the present Agreement, with his functions as a private owner of his own ship, or whether he wished the contrast to be between the present agreement and previous operating agreements of Government ships. We, therefore, answer both. And first will answer (a).

The contrast may be generally stated thus: The private operator of his own ship can do any lawful thing with it that he pleases. The Agent under this present Agreement attends only to the business of the vessel, and even then only as directed by the War Shipping Administration. The Agent is continually under the supervision and direction of the War Shipping Administration. To contrast the two positions more graphically, we present them in parallel columns:

Private Owner—Normal Peacetime Operation	General Agent—under GAA 4-4-42
1. Can sell, mortgage or otherwise dispose of the ship; or charter her, either as a "bareboat" or "on time" or for "the voyage".	1. Agent has no such rights.
2. Owner solicits cargoes and freight in a peacetime operation.	2. This being a war operation W.S.A. usually designated and provided the cargoes.
3. Owner specifies the voyages, the ports of call, route, destination, etc.	3. W.S.A. does these things. Agent does not.
4. Owner can change voyage and deviate.	4. Agent has no such authority. W.S.A. has.
5. The "venture" is the "venture" of the owner. The profits and the losses are his.	5. The Agent has no interest in the venture; neither the profits nor losses are his.
6. The owner can lay up the ship if he chooses. . .	6. The Agent must continue to furnish the services required by the G.A.A. . .
7. The owner makes such repairs to the vessel as he chooses when, as and if he pleases. He can keep her "in class" or not.	7. The agent has no such rights or discretion. The W.S.A. Maintenance and Repair Division handles all repairs. Cf. Tripp, R. 125 and Article 14 of the Agreement. R. 159.
8. Owner equips, victuals, supplies and maintains vessels as he pleases.	8. Agent equips, victuals, supplies and maintains vessels "subject to directions, orders, regulations, supervision and inspection" of W.S.A. Article 3A(c) of the Agreement.
9. Owner mans the vessel. The master is his employee, and as such engages the crew as employees of the owner.	9. Agent does not man the vessel. The master is employee of the United States, and as such engages crew as employees of the owner—the United States.
10. Owner may issue instructions to the master on management and navigation of the vessel.	10. Agent has no authority to give such instructions to the master. These instructions proceed from the W.S.A.

Private Owner—Normal Peacetime Operation	General Agent—under GAA 4-4-42
11. The owner issues its own bills of lading.	11. Agent signs bills of lading in form prescribed by W.S.A.: "For the Master By ..... Agents for United States of America (W.S.A.)" Article 3A(e) and Page 272 "Compilation of Standard Contract Forms".
12. Owner makes all arrangements or contracts for stevedoring.	12. W.S.A. makes contracts with stevedoring companies. It has a master contract with them.
13. Owner arranges his own insurance of all kinds or may operate vessel without any insurance.	13. W.S.A. provides all insurance including P and I.
14. Owner has the rights of a salvor and prosecutes claims for salvage on his own account and for the crew.	14. The Agent has no such rights or duties. See Article 19 of the Agreement. R. 157.
15. Owner can limit his liability under the limitation of liability laws.	15. Whatever liabilities the Agent may have, — he cannot limit them.

The foregoing, while perhaps not all, afford a clear illustration of the many differences in the two situations.

Now we answer (b), i. e., "What is the difference between this Agreement and former ones?"

Of course former agreements are not in the record, nevertheless we shall do our best to answer. In the first place, the purposes to be accomplished by the present agreement were entirely different from those to be accomplished under previous agreements. Previous agreements were devised for commercial, peacetime operations, on regular lines or routes, and when the national policy was for *private* operation of ves-

sels. The G.A.A.—4-4-42 agreement was devised for war-time operation of the ships, carrying principally military cargoes, and sailing wherever required for logistic support of the armed forces, and when the national policy required complete control by the Government. In the second place, even the titles of former agreements were different from the present. The former agreements were designated "operating agreement", or "managing agreement" or "agency agreement for managing and operating vessels". The agreement between the United States Shipping Board Merchant Fleet Corporation and Southgate Nelson Corporation, which was the one involved in the Quinn case, is called "Operating Agreement, 1935". The present agreement is entitled; "*Service* Agreement for Vessels of Which the War Shipping Administration is Owner or Owner Pro Hac Vice". But the differences go much deeper than the mere titles. In former agreements the Agent "manned", *managed and operated the vessels.* In the present agreement there is no "manning", and there is a distinct separation between the "business" of the vessel and the "vessel" herself. The Agent in the present case manages and conducts only the *business* of the vessel. Articles 1 and 2. The *navigation* and *management* of the *vessel* itself is in the "full control" of the master. Article 3A(d). This is different from the former agreements because in them the agent undertook not only to "manage and conduct the business", but also undertook to *manage and operate the vessel herself.* An illustration of this is the Agency Agreement in Quinn v. Southgate Nelson Corp., 121 F. (2d) 190, affirming 36 F. Supp. 873.

There the Agent manned the ship, and not only agreed to "manage, operate and conduct the business of the line", but also agreed to "operate the vessels". It may also be noted that in our present agreement the Agent is expressly declared to be a mere agent and not an independent contractor,—a declaration which was missing from former agreements. Also, the Agent's compensation was different in former agreements; even going to the extent of sharing in the profits in some cases. See U.S.S.B.E.F.C. v. Greenwald, 16 F. (2d) 948, 951.

We do not wish to be understood as implying that in former agreements the Agent was the employer of the crew. So far as we know, that precise question was not decided, and certainly never by this Court, even though the Agent in those previous cases "manned" the ship. If he did it merely as Agent for the United States, and not for his own account, he would not be the employer; although he might be liable for negligence in not selecting a proper crew, or for breach of his contract to do so. Be that as it may, in the present case, for the reasons already so often stated, we think the non-employer status of the Agent is clear.

Mr. Justice Black asked to be informed what was the Agent's compensation under the present agreement. We have looked that up. It was fixed by the War Shipping Administration's General Orders 12 and 34, and as they were published in the "Federal Register", the Court may take judicial notice of them. General Order 12 was promulgated June 10, 1942,

and was published in the "Federal Register" June 16, 1942, as Document 42-5546. It continued in effect, with various supplements here immaterial, until December 31, 1943, at which time it was superseded by General Order 34, which was published in the "Federal Register" on Tuesday, January 4, 1944, at Page 110. Although General Order 12 thus became ineffective December 31, 1943, it was nevertheless republished in the "Federal Register" on May 30, 1944. Apparently the reason for this was that it had had, during its life, so many supplements, 16 in all, that it was thought wise to codify it and republish it for easy reference by those who still had questions which had arisen during its life, and therefore were governed by it.

In reading these Orders, it should be understood that there are, in general, four classes of agents covered by them; (1) the General Agents (as in this case); (2) Agents; (3) Berth Sub-Agents; and (4) Sub-Agents. Confusion is apt to arise between the words "General Agents" and the word "Agent". The "General Agents" were those who attended to the business of vessels of which the War Shipping Administration was owner or owner pro hac vice, as in this case. The "Agents" were those who attended to the same duties (except procuring master and crews) on vessels time-chartered to the War Shipping Administration. Both General Agents and Agents received the same compensation (which, by the way, illustrates what a minor part of the General Agent's duties was the procuring of the crew. For the Agent,

on a time-chartered ship, who had nothing to do with crews, nevertheless got the same amount of compensation as the General Agent). The "T.C.A.", or Time Charter Agency Agreement may be found on Page 341 of the "Compilation of Standard Forms of the War Shipping Administration", printed by the Government Printing Office for use of the House Committee on the Merchant Marine and Fisheries, 1945.

These General Orders 12 and 34 will be easier to understand if it is realized that the General Agent's and Agent's duties were to "husband" the ship. For this they received flat fees. The handling of cargo was a separate function usually performed by the Berth Sub-Agent, and for this 2½ cents, or 10 cents, or 15 cents, etc., as the case might be, per "handled ton" was paid. If the General Agent or the Agent, besides performing the "husbanding" duties, also attended to the handling of the cargo, he, instead of the Berth Sub-Agent, could receive the compensation for so doing. In short, whoever handled the cargo got paid for it on the basis of "handled tons". These General Orders are somewhat complicated, and we are not too expert in them ourselves, but we believe the foregoing explanations are correct.

To come now to the precise question: The General Agent's Compensation. This is covered in General Order 12, in Paragraph 9 (§306.9 in the revised codified form). The General Agent (or Agent in the case of a time-chartered ship) was paid on the basis of "payable tons of the vessels handled during each such month", according to the following scale:

First 80,000 tons 50¢ per payable ton per month.
Next 40,000 tons 40¢ per payable ton per month.
Next 40,000 tons 30¢ per payable ton per month.
Next 40,000 tons 25¢ per payable ton per month.
Next 50,000 tons 20¢ per payable ton per month.
Over 250,000 tons 15¢ per payable ton per month.

Paragraph 10 (§306.10 of the revised codified form) provides for the revision of this scale upward if it appears that it is insufficient, together wth the General Agents' other earnings, to cover overhead expenses.

Conversely, Paragraph 11 (§306.11 of the revised codified form) provides for a "recapture", or scaling down, of the compensation if the War Shipping Administrator determines that it has been excessive.

General Order 12 in its original form did not provide for renegotiation, but in its revised form it did, in §306.69(c), unless the recapture clause had already taken care of any excess compensation.

As already stated, this Order No. 12 was superseded by General Order 34 on December 31, 1943. This too provides for recapture and renegotiation. The principal change made by the new Order was that instead of the General Agent's compensation being on the "basic scale" above described, it was $65 a day for husbanding the ship, and $15 a day for accounting (§306.72(a) and (b) of General Order 34).

ARTICLE 7 OF THE GENERAL AGENCY AGREEMENT

We discuss this because of Mr. Justice Rutledge's interest in this Article.

Article 7 of the General Agency Agreement provides that the United States shall reimburse the General Agent for all expenditures in "performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder". This merely means that when the Agent, acting as agent on behalf of the United States, makes expenditures for these items, it will be reimbursed.

This Article also provides that "to the extent not recovered from insurance", the United States shall reimburse the Agent for all crew expenditures, including all disbursements for wages, overtime, etc., and for maintenance, cure, "damages or compensation for death or personal injury or illness . . . ."

We think it clear that this merely has the same effect as the first part of Article 7,—namely, that when the Agent, acting as agent, makes such expenditures for the Government, he shall be reimbursed.

With respect to "damages or compensation for death or personal injury or illness", the question of reimbursement under Article 7 actually does not arise. For all such claims were covered by the Wartime P and I Agreement of December 1, 1942, which the Government provided pursuant to Article 8 of the G.A.A.

This P and I Policy is printed in full, with its addenda, at Pages 775-799, inclusive, of the Compilation of Standard Contract Forms of the War Shipping Administration, printed in 1945 by the Government Printing Office for the use of the Committee on Merchant Marine and Fisheries.[1]

This was the policy in effect at the time of petitioner's injury (See Clause V), and see the reference to Fulton Group (Clause 1), and plaintiff's Exhibit 17, Record, P. 148. In actual effect, it was a management contract with underwriters, for the premiums paid under Clause VI are readjusted under Clause VII, whereby the United States pays all losses, and the Underwriters retain only 10 per cent of the excess of premiums over losses and management expense; and, by Clause II of Addendum No. 2 (Page 797 of Compilation) the underwriters must return to the United States any part of this 10 per cent in excess of $300,000.

It is to be noted from Clause VIII (Page 778) that the Underwriters are to provide "claims service". That is of course why the Assistant General Counsel for War Shipping Administration instructed respondent to take Hust's claim up with the P and I Underwriters. (Plaintiff's Exhibit 17, Record, P. 147-8).

It will also be noted the General Agent had authority to settle life, injury or illness claims directly only up to a limit of $250 each. (Clause IV(b) of Ad-

[1] An ample supply of these documents is on hand at the Office of the Committee, and we requested the Document Clerk to send one to the Clerk of the Court.

dendum No. 1, Page 795 of Compilation). The Underwriters had authority up to $25,000, and claims in excess of that figure could be made only on approval of the War Shipping Administration. (Article X, Page 779 of Compilation).

Thus, we think Article 7 of the General Agency Agreement is entirely consistent with the Agent being an agent, and that any payments to be made are made as an Agent for the United States. We do not think it was intended by this Article to make the Agent liable to a direct suit by a seaman to recover for injuries. The House Committee on Merchant Marine and Fisheries, which was familiar with the General Agency Agreement, did not think so, for they said, in reporting on Public Law 17:

> "The only modification thereof arises from the remedeial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. Ths procedure is appropriate in view of the fact that *the suits will be against the Government of the United States.*"

We point out also that Article 7 was never regarded by the seamen's unions as having anything to do with defining the status of the seamen and their relation to the Government. It was only Article 3A(d) which was incorporated into the Statement of Policy which the Administration signed with the unions. This alone was the clause which the unions regarded as defining the seamen's status, and this alone was the clause which they printed in the union pamphlet (Pages 47, 48 of Exhibit 15.)

SIXTH: MR. FREEDMAN'S BRIEF

The burden of Mr. Freedman's brief is that respondent was an owner pro hac vice. That argument we have already answered. But on Page 6 of his brief occurs the following paragraph, which requires brief notice:

> "Under the general maritime law before the Jones Act the *vessel* and her *owner* were liable to the crew for damages due to unseaworthiness or the failure to supply and keep in order proper appliances. *The Osceola*, 189 U.S. 158, 47 L. Ed. 760, 23 S. Ct. 483. The Jones Act (46 U.S. C. A. 688, 1920) incorporated into the maritime law the Federal Employers Liability Acts. Respondent contends that the suit in the instant case is brought solely under the Jones Act and must be brought against the employer. Aside of the fact that such a relationship is presented in all these cases, it must be noted that such a suit by a seaman is not brought solely under the Jones Act but rather under the maritime law as modified by the Jones Act and these rights are cumulative and not alternative. *Panama R. R. v. Johnson*, 264 U. S. 375, 44 S. Ct. 391; *Brown v. C. D. Mallory*, 122 F. (2d) 98. Thus, the seaman had available to him all the substantive rights in the same action *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 71 L. Ed. 1069. All these rights he could assert against the owner of the vessel."

We are not quite sure what Mr. Freedman means by the foregoing. If he means that a seaman, electing to sue under the Jones Act, can sue someone who is not his employer, then he is making an entirely new contention in this case, and is, besides, clearly wrong.

Robinson v. Baltimore Ohio R. R. Co., 237 U.S. 84.
Hull v. Philadelphia Reading Ry. Co., 252 U.S. 475.
Panama R. R. Co. v. Johnson, 264 U.S. 375.
The Norland, 101 F. (2d) 967.
Nolan v. General Seafoods Corp., 112 F. (2d) 515.

But we take it Mr. Freedman does not mean this, but rather that a seaman, suing under the Jones Act, can sue the owner of the vessel *because such owner is his employer*. And then Mr. Freedman proceeds to develop his argument that the respondent here was owner pro hac vice, and therefore suable. That argument, as stated, we have already answered.

In view of the ambiguities of Mr. Freedman's paragraph above quoted, we deem it proper to state our own view of the law. Prior to the enactment of the Jones Act, the seaman had certain rights under the general maritime law. These were stated in The Osceola, 47 L. Ed. 760, and are well understood. A seaman could not sue for damages caused by the negligence of the master or of the crew, since these latter were fellow servants. This prevented nearly all suits for damags because the injuries were nearly always caused by the negligence of the master or of the crew. Then along came the Jones Act—a part of the Merchant Marine Act of 1920. It greatly increased the seaman's rights, for it gave him an action for negligence, abolished the hitherto almost insurmountable defense of fellow servant, declared that these new rights should be enforced by jury trial and forbid re-

moval to a Federal Court. This was accomplished by incorporating the Federal Employers Liability Acts. The seaman could sue under the general maritime law, or he could "elect" to sue under that law, as modified and strengthened in his favor by the Jones Act.

But when the seaman elects to take the very material benefits that the Jones Act added to the maritime law, then he is confronted with one definite requirement — he must show that the *defendant was his employer.* It was in clear recognition of this that petitioner has throughout tried to prove the employer-employee relationship; and as a corollary, has tried to prove that respondent was an owner pro hac vice, and therefore an employer. Recognizing the necessities of petitioner's position, Mr. Freedman was forced to contend at the oral argument that respondent was a "bareboat charterer". Mr. Justice Frankfurter asked him if that were his contention. We made a note of Mr. Freedman's answer. He said yes, that was his contention "precisely".

How far removed respondent was from a "bareboat charterer" we have already shown.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

CECIL I. HUST,

Petitioner and
Plaintiff-Respondent below,

against

MOORE McCORMACK LINES, INC.,

Respondent and
Defendant-Appellant below.

PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*, and BRIEF *AMICUS CURIAE*

SILAS B. AXTELL,
15 Moore Street,
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PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*, and BRIEF *AMICUS CURIAE*

To—THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for various complainants, respectfully petitions this Honorable Court for leave to file the accompanying brief amicus curiae on the filed consent of the attorneys for the petitioner, Cecil I. Hust and the respondents in the above entitled petition.

Your petitioner has read the petition of Cecil I. Hust and the brief submitted by his attorneys in support of his petition for writ of certiorari herein, and concurs and endorses the arguments and reasons therein set forth in favor of the granting of said petition.

Your petitioner, Josephine Fontao, administratrix of the estate of Jose Fontao, deceased, alleges that she is the plaintiff in a cause of action in the United States District Court for the Southern District of New York, Civ. 24-156, which will be reached for trial within sixty (60) days. That her husband, the chief officer of the S. S. "Agwiprince", a vessel owned, operated and controlled, according to the answer of the defendant named, "Agwilines", was killed through the negligence of the operators of said vessel on the high seas on the 1st of November, 1942. That since the case was commenced she has been informed that although the defendants admit ownership, operation and control of the vessel, they will contend that her husband was actually employed by the W. S. A. and the United States of America, under a "General Agency Agreement" with the defendant named. She further alleges that while her action at common law was commenced on the 2nd of February, 1944, within two years after the death of her husband, more than two years has elapsed since his death, and had elapsed before she learned, or before her attorney had been informed that such a contention of employment by the W. S. A. could be made, and she believes that the Statute of Limitation might be effective as a defense and prevent her from now filing a libel against the United States.

She alleges that her husband was lost through the negligent navigation of the S. S. "Agwiprince" and by reason of the unseaworthy condition of the said vessel, in that certain heavy deck cargo had become loosened in bad weather, and the fore-peak and after-peak of said vessel had become filled with water in bad weather, so as to cause said vessel to be down by the head, and that her husband was injured so seriously that he died on the said date, while in the performance of his duties, and through the negligent act of the master and officers and navigators of said ship, in that they failed to take proper steps to protect him, while he was exposed to the violence of the

seas in making an inspection of the deck cargo on the fore-peak of the vessel as aforesaid.

For these reasons, your petitioner deems it important that the question of her right to pursue her action at common law be determined by the Supreme Court of the United States at an early date.

That your petitioner, Earl C. Mander, a mariner, and second officer of an American vessel, the S. S. "John Motley" alleges that he met serious injury on the 18th of August 1943, while employed by the American Export Line, Inc., owners and operators of said vessel.

While your petitioner has filed a libel in a cause of action based upon the negligence of the respondent, the American Export Lines, Inc. and the United States of America within the two years permitted under the Suits in Admiralty Act, he believes he is entitled, as a citizen of the United States to a trial by jury, and your petitioner alleges that he desires as a citizen of the United States, to prosecute his action at common law and to have a jury trial, but he does not wish to waste the time of the trial court or of the Appellate Court in obtaining a judgment at common law which might later be set aside on the ground that his sole remedy was under the Suits in Admiralty Act.

Your petitioner alleges that on the 18th of August, while obeying orders of the master of the ship to supervise the uncovering of a deep tank in the ship, he was knocked unconscious and seriously and permanently injured by the explosion of gas formed by a mixture of air, water and calcium carbide, and this explosion occurred by reason of the negligence of the American Export Lines in permitting and directing that this particular kind of cargo (of a dangerous character) be carried in a sealed compartment in violation of well established precautions, and this petitioner therefore petitions this court to grant a writ of certiorari to Cecil I. Hust, because he thinks

that the determination of the rights of the petitioner Hust, will decide the case whether or not your petitioner Earl Mander has a right to try his case at law under the Jones Act.

Your petitioner Jeannette Bitcon, widow of Roy E. Bitcon, alleges that she was duly appointed administratrix of the estate of her husband at Nassau County, Long Island, N. Y. on July 9th, 1945. That she has filed a libel and complaint against the United States of America, and the Luckenbach Steamship Company for damages sustained through the death of her husband who was employed by the firm of Sullivan Dry Dock and Repair Company at a salary of $4600.00 a year, and who was caused to fall from an inadequate and defective ladder furnished to him by the respondent on the 3rd of May 1945, at the foot of Fifty-second Street, Brooklyn, N. Y.

Your petitioner is informed and believes that the circumstances of the death of her husband involving the determination of certain questions of fact, credibility of witnesses, etc. would be that it would be to her advantage as a litigant to have this cause of action determined by a jury of citizens of the United States. She has, on the advice of her attorney, caused a libel to be filed in the United States District Court, Southern District of New York, and she alleges and believes that she is entitled to a trial by jury since the amount of her claim exceeds Twenty ($20.00) Dollars (being a claim of One hundred thousand ($100,000.00) Dollars), by reason of the Seventh Amendment of the Constitution of the United States, and she is informed and believes that Congress, in passing the Jones Act on June 5th, 1920, gave to seamen and their dependents, the right of an election to enforce whatever rights they might have under the said Act, and to have a jury trial as provided by law, and she is informed and believes that no Act of Congress has been passed since then, which specifically or necessarily abrogated or modified that right.

She therefore petitions this Court to grant the petition of the above named Cecil Hust, for the reason that she is advised and believes that the determination of the rights of said Hust, will be determinative of the question of whether she also is entitled to a remedy at common law.

Your Petitioner, THE FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, alleges that it is an unincorporated non-profit membership organization, organized under and existing for the purpose of aiding and encouraging the principles of Andrew Furuseth, who was a leader of seamen from 1885 to the time of his death in 1938. That, as presumably this Court knows, Mr. Furuseth advocated the passage of the La Follette Seamen's Act, which freed seamen from bondage and extended in its terms and by the intent of Congress to foreign vessels, the purpose of improving the status of mariners as to earnings, living conditions on board, and freedom from criminal and inhuman punishment, and for arrest and imprisonment for desertion or breach of contract.

ANDREW FURUSETH, together with his associates and advisors, framed the LaFollette Seamen's Act, including Section 20, a provision which reads as follows:

> "Sec. 20—In any suit to recover damages for any injury on board a vessel, or in its service, seamen having command shall not be held to be fellow-servants with those under their authority."

This Section 20 was found deficient by the Supreme Court of the United States (see *Chelentis* v. *Luckenbach*, 247 U. S. 372). After the decision of the said Supreme Court in the said *Chelentis* case, Section 33 of the Jones Act was passed, and because the right to a jury trial was threatened in another case then pending (*Berg* v. *Philadelphia & Reading*, 274 Fed. 534), the words:

> "Any seaman at his election may maintain any action for damages at law with the right of trial by jury."

were written into the Statute.

The Jones Act, itself, making the Railway Servants' Act applicable to mariners, and abolishing as it did the defenses of assumption of risk, and contributory negligence as complete defenses, has become known (as it was intended by Congress) to be a safety measure.

Negligence is necessarily a comparative thing, depending upon the knowledge of available safety devices of the employer. It has been considered by Mr. Furuseth and by his associates (for the most part merchant seamen and officers of the United States) who are members of this Association, that the Jones Act is a safety measure which is effective in saving human life, in preventing men from becoming maimed, seriously and permanently injured and killed. That it saves the people of the United States heavy burdens in taxes for the maintenance of dependents, and tends to raise the standard of living of people of these United States. The determination of damages by juries has the effect of causing Insurance Companies, their agents and inspectors to be much more alert in the maintenance and repair of vessels, in the use of better and sturdy appliances, and in the use and promulgation of rules and regulations of conduct of the work of a mariner, which is inherently dangerous anyway, and it is therefore a law which is desirable from the point of view of public interest.

WHEREFORE your petitioner respectfully petitions this Honorable Court for leave to file the accompanying brief amicus curiae, and that the judgment of the Oregon Supreme Court should be reviewed and reversed.

SILAS B. AXTELL,
Attorney for Petitioners,
Office and P. O. Address,
15 Moore Street,
New York City.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

SILAS B. AXTELL, being duly sworn deposes and says that he is the Attorney for the co-petitioners named in the foregoing Petition; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

SILAS B. AXTELL.

Sworn to before me this
27th day of November, 1945.

LUCIEN V. AXTELL,
Attorney and Counsellor-at-Law,
Residing in Queens County.

Clerk's No. 2.
New York County Clerk's No. 10.
Office 15 Moore Street.
New York City.
Commission expires March 30, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

CECIL I. HUST,

Petitioner and
Plaintiff-Respondent below,

against

MOORE McCORMACK LINES, INC.,

Respondent and
Defendant-Appellant below.

BRIEF OF *AMICUS CURIAE*

Preliminary Statement

There is an important question of law in the Hust case, which directly effects the rights of various complainants in suits which they have pending, and for which your petitioner is attorney of record, as was made to appear from the foregoing brief statement of their cases in the Petition.

Question

The important question in the Hust case which directly effects the rights of your petitioners on the pending cases above described, is the right of a seaman to sue at com-

mon law, a steamship operator, operating under a General Agency form of contract with the War Shipping Administration, in view of the provision of Public Law 17.

POINT I

Public Law 17, 57 Stat. 45, 50, U. S. C. A. App. Section 1291, not only does not directly modify or amend the provisions of the Jones Act, written specifically for the purpose of granting to seamen the right of election to submit issues of fact to a jury, but shows continuing intent to perpetuate those provisions.

To assume that Congress would deliberately take from seamen and the Courts the right of having their damages fixed by jurors of their fellow citizens, would require strong statutory intent, plain and unmistakable, which is not present in the instance of Public Law 17.

The intent of Public Act 17, would seem to be a reassurance to seamen that their common law remedies, saved to them from the beginning were still preserved to them notwithstanding the state of war and changes in shipping administration.

The Seventh Amendment to the United States Constitution; the saving clause in Section 9 of the First Judiciary Act of 1789,—1 Stat. 76, now Judicial Codes Section 24 and 256, as these remedies have been reaffirmed, and the rights of seamen under them broadened by Section 33 of the Jones Act, 46 U. S. C. A. 688.

At the start, the Statute states generally, that officers and members of the crew employed by the War Shipping Administration, shall have all the rights under the law applicable to citizens of the United States, employed as seamen on privately owned and operated American vessels.

The Act then makes a single exception as to compensation claims for personal injuries, or as the Act states:

"CLAIMS ADMINISTRATION DISALLOWED" and states that these claims shall be enforced under the Suits in Admiralty Act.

Here, by the clearest intendment, the common law remedies for other claims for personal injuries, that is, claims other than compensation claims, were saved to the officers and members of the crew.

The Oregon Supreme Court however, in the Hust opinion has rehearsed this Statute, and the long and involved House Report No. 107 (1943 A. M. C. 617) which accompanied it, and has arrived at the conclusion that the seamen were intended to be treated as employees of the War Shipping Administration only, and limited to the remedies under the Suits in Admiralty Act.

The conclusion of the Oregon Supreme Court on this point of law is directly opposite to that of Judge Levy (March 1944). The Oregon Court endeavors to distinguish the Gau case on its facts.

POINT II

The Hust case presents the defense of a steamship operator to a seaman's suit at common law for personal injuries, by arguments based upon an agency device which requires some study. A divided agency was created leaving to the operator an agency in matters of operations.

AN AGENCY IN MATTERS OF OPERATION.

The Agency device is found in Article 3A (d) of the General Agency Agreement between the operator and the War Shipping Administration which provides:

> "The General Agent shall procure the master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority

with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for management by him, the officers and men required by him to fill the complement of the vessel, * * *."

Article 3A (d) of the General Agency Agreement gave merely a limited field of control to the War Shipping Administration. The operator had the whole wide field of merchant seamen from which to make its selection, but it was only as to those the operator selected that the War Shipping Administration reserved the right of approval.

It is true that the agreement did provide that the Master shall be an agent and employee of the United States for some purposes only, to wit: navigation and management of the vessel. IT DID NOT SAY THAT THE MASTER SHOULD NOT ALSO BE AN AGENT OF THE OPERATOR FOR OTHER PURPOSES, to wit: operation, or even for the same purposes of navigation and management.

There is a *non sequitur* in stating that because one of the parties stipulates that a person shall be his agent for some purposes, that he is therefore his agent for all purposes, and not the agent of the other party for any purpose.

Take for example the work of the ordinary interpreter (*Miller* v. *Lathrop*), 50 Minn. 91; N. W. 274 (1892), who is agent for both parties at the same time. There is nothing new about it.

Even as to the Master there was a divided agency created here. The jump from a reserved limited agency for the Government, to an assertion that other officers and members of the crew were employees of the United States because the operator referred them to the Master, and were in turn hired by the Master, is one that is not warranted.

The reason for the divided agency is apparent. Sufficient reason existed in the necessity for secrecy and

security control. There were certain very definite sea routes which the Navy undertook to guard. There were certain bases where supplies were to be delivered which the armed forces undertook to defend. There were certain procedures to be followed enroute, and at ports, such as blackouts, zigzags, variation in speed, etc. The orders for the navigation and management of the ship in these respects must necessarily come from the Armed Forces directly to the Master of the ship.

But otherwise, did it mean that the War Shipping Administration was committed to the operation of the ship? Did it mean that the War Shipping Administration was to decide whether a chain or a rope was to be used to guard an open hatchway, or what kind of light should be maintained in the darkened forepeak of the ship?

POINT III

A construction of the General Agency Agreement which holds the private operator liable for injuries to seamen received in the operation of the vessel is the only construction which gives meaning to the agreement.

Considering further the arrangement between the parties themselves for the protection of the officers and members of the crew, we come to Article 16A of the Agency Agreement, noticed by the Oregon Supreme Court in the Hust opinion (1945 AMC. 527), in which the United States agrees to indemnify the general agent against claims asserted for injuries to persons arising out of the operation of the vessel.

This language merely follows the controlling section of the *Merchant Marine Act of 1936*, 46 U. S. C. A. Section 1202, which requires the operator to carry insurance against personal injuries, provided that some or all of such insurance risks may be underwritten by the Commission.

Now, it is clear that if the officers and members of the crew were not agents of the operator, then the provision for insurance by the operator would be entirely ineffective, because there would be no insurable interest. (*Century Ins. Co. Ltd.* v. *Northern Ireland Co.*; 1942, A. C. 509.)

Furthermore, there is a vast difference in the shifting of the risk as in the case of re-insurance by the Government and the prevention of risk in the direct insurance by the operator. (See *Vicarious Liability and Administration of Risk*, 38 Yale Law Journal 584, 601.) As explained, *supra*, it was the prevention of risk that was the motivating force behind the passage of the Jones Act.

By holding officers and members of the crew agents of the operator, there is both a distribution of the social risk and cost, and what is more important, there is the long range factor of prevention of risk. By holding the seamen agents of the United States on the other hand, there would be no prevention of risk because in that event, there would be no loss to the operator to be guarded against in future cases by the person most able to guard against them.

POINT IV

The private operator did not go to war.

Realizing the peril in the divided agency created the operator has gone all out and secured from the Oregon Supreme Court, the holding expressed in the following words, 1945 AMC. 523:

> "* * * The agreement was made in time of war; the vessels operated under it were and still are, as we judicially know, practically in the military service of the United States; and it is not to be supposed that in those circumstances the War Shipping Administration contemplated anything less than that they should be under the complete and exclusive control of the United States."

This case is not like that of an operator of a private taxicab, whose cab is commandeered by a policeman in pursuit of a criminal. *Balinovic v. Evening Star,* 113 F. (2) 505; 72 App. Div. 176 (1940).

The terms of the operation in the Hust case were strictly private and proprietary in nature, and the subject of contract. *The Merchant Marine Act of 1936,* 46 U. S. C. A., Sections 1171 and 1191, clearly define the private profit motive of the business.

There is an "operating differential subsidy" for vessels in foreign service (Section 1171) and there is a regulated profit of ten per cent on capital employed, with an additional profit of one-half of the excess over that amount (Section 1191).

The operator itself did not go to war. It was merely a corporate entity, a legal fiction, dedicated to the cause of private profit for its stockholders and committed by contract with the War Shipping Administration to the dispatch of duties in the operation of the vessel from which it made its profit.

By attempting to shift its duties of operation to the ship, and from the ship to the War Shipping Administration, the operator merely side-steps the issue. In the same way it side-steps the issue by procuring a master for approval of the United States, and then procure the other officers and members of the crew for the master's approval, and then saying that these men are not its servants, even though it retains the role of paymaster and the contractual duty to man, victual, equipment, supply and maintaining the vessel.

The injury received in the fall through the unlighted unguarded hatchway was an operating loss for which the operator was responsible and for which it was liable. *Brady* v. *Rosevelt,* 317 U. S. 575, and for which the seaman had a common law remedy preserved to him even in war time by Public Act 17. The jury correctly decided that the operator was responsible and liable.

CONCLUSION

The judgment of the Oregon Supreme Court in the *Hust* case should be reversed.

Respectfully submitted,

SILAS B. AXTELL, Attorney,
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MYRON SCOTT,
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Defendant-Appellant below.

PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*

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IN THE

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PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, as general counsel for the National Maritime Union of America, respectfully petitions this Honorable Court for leave to file the accompanying brief *amicus curiae* with the consent of the attorneys for the petitioner, Cecil I. Hust.

Your petitioner has read the petition of Cecil I. Hust and the brief submitted by his attorneys in support of his petition for writ of certiorari herein, and endorses the arguments and reasons therein set forth.

The National Maritime Union of America alleges that it is a non-incorporated membership organization, organ-

ized and existing under and by virtue of the laws of the State of New York, for the purpose of improving the conditions of workers employed in the American Merchant Marine. It has a membership of more than 90,000 seamen. Having written collective bargaining agreements with more than 125 private shipping companies, it maintains branches in all of the principal ports along the Atlantic, Gulf and Pacific coasts including a branch in Puerto Rico and Hawaii. That various members of the National Maritime Union have employed the undersigned to represent them in proceedings filed in the United States District Courts as well as the Supreme Court of the State of New York to recover damages for personal injuries and damages arising out of the death of various members.

That Public Law 17 before its adoption and while considered by Congress was known as H. R. 133. That both prior to the introduction of the bill and while the bill was under consideration in the House the petitioning union through its Washington representatives presented the views of the Merchant Seamen and indicated the extent to which the members of the petitioning union would be affected by the proposed law. We urged then, as we urge now, that the private steamship companies which would take over the government's ships were to be considered as private operators. That this decision was dictated by the fact that the union was a party to collective bargaining agreements to all of the ship owners whose vessels were requisitioned, and who thereafter became general agents for the W. S. A.

The members of the petitioning union are vitally interested in attempting to preserve their rights given to them by Congress under the Jones Act. One of the fundamental rights given to railway workers is the right of trial by jury. The Jones Act specifically gives the seamen the same remedy. An interpretation of the G. A. A. under the *Hust* case definitely takes such right from the seamen.

WHEREFORE, your petitioner respectfully petitions this Honorable Court for leave to file the accompanying brief *amicus curiae*, and that the judgment of the Oregon Supreme Court should be reversed.

Attorney for Petitioners,
Office and P. O. Address,
291 Broadway,
New York City.

STATE OF NEW YORK,
CITY OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

WILLIAM L. STANDARD, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Sworn to before me this
5th day of March, 1946.

William L. Standard

Abraham Weisberg

Notary Public.
Kings County Clerk's No. 211.
New York County Clerk's No. 754.
Commission Expires March 30, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

CECIL I. HUST,
Petitioner and
Plaintiff-Respondent below,

against

MOORE McCORMACK LINES, INC.,
Respondent and
Defendant-Appellant below.

BRIEF OF *AMICUS CURIAE*

Preliminary Statement

There is an important question of law in the *Hust* case which directly affects the rights of seamen. Many of them are members of the National Maritime Union as stated in the petition and many of them have suits pending in the various courts throughout the United States to recover damages for injuries sustained on board ship.

The vital question is whether or not under the General Agency Agreement entered into between the War Shipping Administration and the various private steamship companies these private companies are exonerated from liability under the Jones Act. At the time of the preparation of this brief the various lower courts, with the exception of the Oregon Supreme Court in the *Hust* case, have not squarely decided that important question.

POINT I

The General Agency Agreement is in effect an operating agreement although the crew may be technically employees of the United States.

The General Agency Agreement, or, as it became known later on, the G. A. A., came into being on April 4, 1942. It was a universal one in the shipping industry and was made mainly to enable the government, in its far-flung maritime activities, to utilize the facilities, skill and "know-how" of experienced ship operators for those vessels that had not only been built for the government, but which the government had seized at the outbreak of the war through its administrative agency, the War Shipping Administration.

Petitioner Hust's attorneys have amply analyzed the agreement in the brief in support of certiorari. Reading the instrument as a whole rather than emphasizing such phrases that the drafters injected for the purpose of indicating that it was something other than an actual operating agreement, the conclusion is irresistible that in effect it is an agreement for operation and nothing else.

The reason for it is obvious. The government lacked both the facilities or the "know-how" and the experience. It retained these private steamship companies in order to utilize efficiently going civilian concerns for the war effort.

The merchant marine was of the utmost strategic importance. Obviously it could only be of such strategic importance in the hands of experienced men. To say then, as the Oregon Supreme Court said in the *Hust* case, that it was a mere service agreement, would defeat the very purpose of the government assigning these ships over to the private steamship companies.

To indicate to what extent the government desired to utilize the experience of these private steamship companies with whom it made these agency agreements the following

is rather significant. Under Public Law 17 the Commission, for the purpose of carrying out the provisions of that law, made certain rules and regulations. In Rule 304.25 there is a specific provision that in those claims involving personal injuries and death, or maintenance and cure, before suit can be commenced there must first be filed a notice setting forth the time, place and cause of the accident or claim. There is a similar provision in the very same rule under claims arising out of war risk insurance policies.

In the latter claim (war risk insurance) the War Shipping Administration maintains control and the provision in that rule, is to the effect that such claim must be filed with the Chief Adjuster of the War Shipping Administration in New York. On the other hand, in claims arising out of damages for personal injuries or death, or maintenance and cure, the rule provides that such notice must be filed *with the general agent of the vessel.*

It is perfectly apparent that not only did the government desire to utilize the vast experience of these private steamship companies in the operation of the government owned vessels, but furthermore took advantage of their vast experience in the handling of personal injury claims. If the Oregon Supreme Court is correct in its interpretation of the General Agency Agreement, and if the War Shipping Administration is not only technically, but actually, the employer of the crew, doesn't it seem rather incongruous that a provision was made by the War Shipping Administration compelling the filing of these claims with these experienced private steamship companies?

Another rather significant factor that strongly leans towards the real meaning and intent of this agreement is that despite the obvious desire of the drafters of the instrument to avoid the effect of the Brady decision, time and again the drafters were hard put to it in avoiding the use of the world "operation" or language of similar intention. So, for instance, there is a provision that the agent

shall continue to use its usual commercial form in bill of lading. Under Articles 5 and 7 provision is made for payment for services rendered under the agreement and there we find two types of payment or reimbursement; one for general administrative expenses such as taxes, etc., and other payments to be made for "maintenance, management, *operation* or the conduct of the business of the vessels hereunder."

Under Article 8, a provision is made for reimbursement to the agent for payments made for maintenance and cure, personal injuries and death claims and under Article 16-A the War Shipping Administration agrees to indemnify the agent against all claims, whether involving personal injuries or property, arising "out of or in any way connected with the *operation* or use of said vessels, etc."

Furthermore, the source and manner of hiring the members of the crew remained the same as it had existed prior to the advent of the agency agreement. Wherever there were union contracts, they were to be respected and followed and the union hiring hall was still the source of obtaining crew personnel.

On May 8, 1942, within a month after the adoption of the G. A. A. (April 4, 1942), there was issued a statement of policy by Emory S. Land, Administrator, Edward McCauley, Assistant Deputy Administrator, and William Radner, counsel for the W. S. A., and Joseph Curran, President of the National Maritime Union of America (petitioning union). Defining the intent of the War Shipping Administration in its relationship to union hiring, wages, etc., and in clarification of that article of the General Agency Agreement which stated, in effect, that the General Agent is to procure the master of the vessel who shall be an agent and employee of the United States, the policy expressed in that document states that the intention of that clause was to make available fully a supply of officers and men and to avoid favoritism as to conditions between one agent and another with respect to preference of employment or use of union hiring halls, etc.

The statement of policy further provided that all existing collective bargaining agreements be continued. Later on, when there was some doubt expressed as to whether that statement of policy would apply to new agents that the government may secure, Edward McCauley, Assistant Deputy Administrator, in a communication to the petitioning union, reaffirmed the policy to the effect that those private steamship companies who had contracts with the National Maritime Union were to be continued as such agents and would be among those chosen as agents under the agreement.

Again, later on (September of 1943), some changes were suggested by the union to the private steamship companies, members of the American Merchant Marine Institute, all of whom had General Agency Agreements. These changes involved wages and working conditions. It is significant that all of these companies, acting through the Institute in their negotiations with the union, assumed the position of employers of the crews.

On November 2, 1945, at the request of Mr. McCauley, there was submitted a report by Hubert Wyckoff, Assistant Deputy Administrator for maritime labor relations, in the form of a summary as to how effectively the unions cooperated with the steamship companies in the war effort. It is a rather comprehensive review and we shall not attempt to quote from it, but a reading of it persuasively suggests that the relationship of crew members towards the various private steamship companies, is continuously treated as that of employer and employee.

In fulsome praise it suggests that the no-strike agreement made by the unions shortly after Pearl Harbor was meticulously observed. It sets forth that in the enactment of Public Law 17 the rights and benefits accruing to merchant seamen heretofore employed on private vessels was made applicable to men employed on government owned or seized vessels. It specifies that mutual benefits arose out of the relationship and that the discipline and order, so much desired on merchant ships during the war, was

readily acknowledged by the unions and in turn the men received the benefits of private merchant seamen. It set forth that the remedial Jones Act benefits were to be made available to seamen working on these vessels.

One of the basic and most fundamental rights under the Jones Act is the trial by jury. The Oregon Supreme Court, in its decision, takes away that right and modifies the Jones Act by permitting its principles of law to be made applicable only in the admiralty courts.

When Public Law 17 was before Congress it was then known as H. R. 133 and it is interesting to note that the House report, in discussing the general policy of the War Shipping Administration, states that the vessels owned by the W. S. A. "are *operated* by experienced steamship companies as general agents for the Administrator" (1943 A. M. C. at p. 617).

Again it is pointed out in the House report that the General Agency Agreement specifically provides that the agent shall procure officers and crew for W. S. A. vessels through "the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time" (Article 3-A(d), General Agency Agreement).

The House report further states: "The intention of this provision is to authorize the general agent to procure his seagoing personnel through the customary channels in cases where the general agent had previously operated under union contracts." The government certainly had no "customary channels".

The Oregon Supreme Court nevertheless insists that the War Shipping Administration is the operator and relies strongly on the article making the master an employee of the W. S. A. Such holding, it seems to us, disregards the intent and purpose of the entire arrangement. Such holding disregards the expressions of Congress. Such

holding takes away from seamen the oft-expressed policy that he have the same rights as a railroad employee.

The seamen, as is now well known, have fought long and hard in their attempt to better their conditions. All this remedial legislation was not fast in coming to them. The right of trial by jury was not the least of them. Can such a fundamental right given to them by Congress be taken away by an agreement?

Furthermore, the interpretation of the General Agency Agreement in the *Hust* case would make meaningless the entire theory of hiring experienced steamship operators. If the W. S. A. operates the vessel under the General Agency Agreement, of what value is this effort to make sure that this strategic force, so essential to the war effort, became really effective. To what purpose these huge sums of money paid to these private steamship companies!

CONCLUSION

The judgment of the Oregon Supreme Court in the *Hust* case should be reversed.

Respectfully submitted,

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City of New York.

JACQUIN FRANK,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

CECIL I. HUST,

Petitioner and
Plaintiff-Respondent below

against

MOORE-McCORMACK LINES, INC.,

Respondent and
Defendant-Appellant below

PETITION AND BRIEF *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

CECIL I. HUST,

Petitioner and
Plaintiff-Respondent below

against

MOORE-McCORMACK LINES, INC.,

Respondent and
Defendant-Appellant below

PETITION OF *AMICUS CURIAE*

To—THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for various complainants, has read the petition of Cecil I. Hust and the brief submitted by his attorneys in support of the writ of certiorari herein, and concurs and endorses the arguments and reasons therein set forth.

Your petitioner, Josephine Fontao, administratrix of the estate of Jose Fontao, deceased, alleges that she is the plaintiff in a cause of action in the United States District Court for the Southern District of New York, Civ. 24-156. That her husband, the chief officer of the S. S.

"Agwiprince", a vessel owned, operated and controlled, according to the answer of the defendant named, "Agwilines", was killed through the negligence of the operators of said vessel on the high seas on the 1st of November, 1942. That since the case was commenced she has been informed that although the defendants admit ownership, operation and control of the vessel, they will contend that her husband was actually employed by the W. S. A. and the United States of America, under a "General Agency Agreement" with the defendant named. She further alleges that while her action at common law was commenced on the 2nd of February, 1944, within two years after the death of her husband, more than two years has elapsed since his death, and had elapsed before she learned, or before her attorney had been informed that such a contention of employment by the W. S. A. could be made, and she believes that the Statute of Limitation might be effective as a defense and prevent her from now filing a libel against the United States.

She alleges that her husband was lost through the negligent navigation of the S. S. "Agwiprince" and by reason of the unseaworthy condition of the said vessel, in that certain heavy deck cargo had become loosened in bad weather, and the fore-peak and after-peak of said vessel had become filled with water in bad weather, so as to cause said vessel to be down by the head, and that her husband was injured so seriously that he died on the said date, while in the performance of his duties, and through the negligent act of the master and officers and navigators of said ship, in that they failed to take proper steps to protect him, while he was exposed to the violence of the seas in making an inspection of the deck cargo on the fore-peak of the vessel as aforesaid.

For these reasons, your petitioner deems it important that the question of her right to pursue her action at

common law be determined by the Supreme Court of the United States at an early date.

Your petitioner Jeannette Bitcon, widow of Roy E. Bitcon, alleges that she was duly appointed administratrix of the estate of her husband at Nassau County, Long Island, N. Y. on July 9th, 1945. That she has filed a libel and complaint against the United States of America, and the Luckenbach Steamship Company for damages sustained through the death of her husband who was employed by the firm of Sullivan Dry Dock and Repair Company at a salary of $4600.00 a year, and who was caused to fall from an inadequate and defective ladder furnished to him by the respondent on the 3rd of May 1945, at the foot of Fifty-second Street, Brooklyn, N. Y.

Your petitioner is informed and believes that the circumstances of the death of her husband involving the determination of certain questions of fact, credibility of witnesses, etc. would be that it would be to her advantage as a litigant to have this cause of action determined by a jury of citizens of the United States. She has, on the advice of her attorney, caused a libel to be filed in the United States District Court, Southern District of New York, and she alleges and believes that she is entitled to a trial by jury since the amount of her claim exceeds Twenty ($20.00) Dollars (being a claim of One hundred thousand ($100,000.00) Dollars), by reason of the Seventh Amendment of the Constitution of the United States, and she is informed and believes that Congress, in passing the Jones Act on June 5th, 1920, gave to seamen and their dependents, the right of an election to enforce whatever rights they might have under the said Act, and to have a jury trial as provided by law, and she is informed and believes that no Act of Congress has been passed since then, which specifically or necessarily abrogated or modified that right.

She therefore petitions this Court to grant the petition of the above named Cecil Hust, for the reason that she is advised and believes that the determination of the rights of said Hust, will be determinative of the question of whether she also is entitled to a remedy at common law.

Your Petitioner, THE FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, alleges that it is an unincorporated non-profit membership organization, organized and existing for the purpose of aiding and encouraging the principles of Andrew Furuseth, who was a leader of seamen from 1885 to the time of his death in 1938. That, as presumably this Court knows, Mr. Furuseth advocated the passage of the La Follette Seamen's Act of March 4, 1915, which freed seamen from bondage and had as its purpose the improving of the status of mariners as to earnings, living conditions on board ship, and freedom from criminal and inhuman punishment, and from arrest and imprisonment for desertion or breach of contract, and for safety of life at sea.

ANDREW FURUSETH, together with his associates and advisors, framed the La Follette Seamen's Act of 1915, including Section 20, a provision which reads as follows:

> "Sec. 20—That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

This Section 20 was found by the Supreme Court of the United States to be not broad enough to cover a case also involving assumption of risk (see *Chelentis* v. *Luckenbach*, 247 U. S. 372, 1919). After the decision of the said Supreme Court in the said *Chelentis* case, Section 33 of the Jones Act of June 5, 1920, was strongly and suc-

cessfully advocated by Mr. Furuseth, and because the right to a jury trial was threatened in another case then pending (*Berg* v. *Philadelphia & Reading*, 274 Fed. 534, C. C. A. 3, 1921), the words:

> "Any seaman at his election may maintain an action for damages at law with the right of trial by jury."

were written into the Statute.

The Jones Act, itself, making the Railway Servants' Act applicable to mariners, and abolishing as it did the defenses of assumption of risk, the fellow-servant rule and contributory negligence as complete defenses, has become known (as it was intended by Mr. Furuseth) to be a safety measure.

Negligence is necessarily a comparative thing, depending upon the knowledge of available safety devices of the employer. It has been considered by Mr. Furuseth and by his associates (for the most part merchant seamen and officers of the United States) who are members of this Association, that the Jones Act is a safety measure which is effective in saving human life, in preventing men from becoming maimed, seriously and permanently injured and killed. That it saves the people of the United States heavy burdens in taxes for the maintenance of dependents, and tends to raise the standard of living of people of these United States.

The determination of damages by juries, Mr. Furuseth firmly believed, has the effect of causing Insurance Companies, their agents and inspectors and particularly the steamship operators, to be much more alert in the maintenance and repair of vessels, in the use of better and more sturdy appliances, and in the use and promulgation of rules and regulations of conduct of the work of a mariner, which is inherently dangerous anyway.

Mr. Futuseth further believed that the Jones Act is desirable from the point of view of public interest, in view of the added protection and inducements it offered to the development of a supply of young and native American seamen, necessary to the maintenance of an American Merchant Marine.

No tacit nullification of the Jones Act should therefore be permitted.

WHEREFORE your petitioner respectfully petitions this Honorable Court that the judgment of the Oregon Supreme Court should be reversed.

SILAS B. AXTELL,
Attorney for Petitioners,
Office and P. O. Address,
15 Moore Street,
New York City.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

SILAS B. AXTELL, being duly sworn deposes and says that he is the Attorney for the co-petitioners named in the foregoing Petition; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

SILAS B. AXTELL.

Sworn to before me this
29th day of March, 1946.

CLARENCE E. ALTHOUSE,
Notary Public.
N. Y. Co. Clk's No. 199, Reg. No. 420A7.
Commission Expires March 30, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

CECIL I. HUST,

Petitioner and
Plaintiff-Respondent below

against

MOORE-McCORMACK LINES, INC.,

Respondent and
Defendant-Appellant below

BRIEF OF *AMICUS CURIAE*

Preliminary Statement

Permission to file this brief was granted by Order of this Court, No. 625, on January 28, 1946.

There is an important question of law in the Hust case, which directly effects the rights of complainants in suits which they have pending, and the purposes of Andrew Furuseth in the building up and maintaining of the American Merchant Marine, as perpetuated by the association which bears his name, for all of whom your petitioner is attorney of record, as was made to appear from the foregoing brief statement in the Petition.

Question

The important question in the Hust case which directly effects the rights of your petitioners is the right of a seaman to sue at common law with jury trial, a steamship operator, operating under a General Agency form of contract with the War Shipping Administration, in view of the provision of Public Law 17 of March 24, 1943, 57 Stat. 45; 50 U. S. C. A. § 1291.

POINT I

Public Law 17 not only does not directly modify or amend the provisions of the Jones Act, written specifically for the purpose of granting to seamen the right of election to submit issues of fact to a jury, but shows continuing intent to perpetuate those provisions.

(a) *The Respondent Steamship Company appears to us to claim in substance that Congress by implication withdrew from seamen the right to a common law action of negligence against a steamship operator acting as a General Agent for the War Shipping Administrator by providing that the seamen should be employees of the United States. The implication appears to us to be quite the contrary.*

To assume that Congress would deliberately take from seamen and the common law courts the right of having the damages of seamen fixed by jurors of their fellow citizens, would require strong statutory intent, plain and unmistakable, which is not present in the instance of Public Act 17.

The intent of Public Act 17 would seem to be a reassurance to seamen that their common law remedies, saved to them from the beginning were still preserved to them notwithstanding the state of war and changes in shipping administration.

The Seventh Amendment to the United States Constitution; the saving clause in Section 9 of the First Judiciary Act of 1789, 1 Stat. 76, now Judicial Codes Sections 24 and 256, as these remedies have been reaffirmed, and the rights of seamen under them broadened by Section 20 of the La Follett Seamen's Act of March 4, 1915, as amended by Section 33 of the Jones Act of June 5, 1920, 46 U. S. C. A. § 688.

These common law remedies were in existence before the enactment of the First Judiciary Act, *The Hamilton*, 207 U. S. 398, 404 (1907); *The New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 390 (1848), and the Seventh Amendment which was proposed for adoption by Congress at the same time that the First Judiciary Act was passed, would therefore seem to have conferred the right to a jury trial upon these pre-existing remedies.

The *La Follette Act* of 1915 as amended by the *Jones* Act of 1920 by merely abolishing the steamship operator's defences would seem to constitute a recognition that the seamen already had the substantive right to sue at common law for their injuries.

The only limitation of these rights appears in the *Suits in Admiralty Act* of March 9, 1920, 46 U. S. C. A. 742, enacted three months prior to the passage of the *Jones* Act. Section 1 of the *Suits in Admiralty Act*, the only section of that Act containing limiting language, stated that no vessel shall, in view of the provisions made for a libel in personam against the United States be subject to arrest and seizure.

A further transitory limitation by judicial construction was put in effect (after ten years of contrary practice by the Fleet Corporation) under the authority of *Johnson* v. *Fleet Corporation*, 280 U. S. 320 (1930). In this case an intent was imputed to Congress to make the *Suits in Admiralty Act* exclusive of seamen's common law remedies, either in rem or in personam, against the Fleet Corporation and the steamship operator.

Since *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, decided January 8, 1943, however, the seaman's common law remedies in personam against the private steamship operator or General Agent have been restored.

In 1927, an attempt was made to nullify the Jones Act by extending to seamen the coverage of the *Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §§ 901, 905.* The measure was opposed by Andrew Furuseth and an exception was written into the bill (*§ 903*), which again saved the seaman's common law remedies. See *Cong. Record, 69th Cong. 2d. sess., Vol. 68, Pt. 5, page 5908.*

Later, in 1936, 1940 and 1942, Congress in the enactment of provisions relating to war risk insurance legislated upon matters which, as will be explained later, closely touched upon the seaman's common law remedies against the operator, and a saving provision was written into the provisions so enacted which saved "the rights of seamen under any provision of existing law." *46 U. S. C. A. § 1128 f.*

The intent of Congress therefore, from this continuous course of legislation, peacetime and wartime, would seem to be in one direction only and that is, with the single exception of limitation of seizure of certain vessels, to preserve the seaman's common law remedies for his injuries, including the right to a jury trial.

(b) *We submit that Public Law 17 is clear and unambiguous to the effect that there is no Congressional intent to limit seamen's rights in personam against the steamship operator, and to the further effect that seamen were not given the status of employees of the United States. It would seem unnecessary, therefore to go into the contents of Congressional committee reports in order to ascertain the intent of Congress.*

At the start, the Statute, *Section 1291 (a)*, states generally, that officers and members of crews employed not "by" but "through" the War Shipping Administration, shall have *all* the rights under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels.

The Act then makes a single exception as to claims for personal injuries, the exception being, as the Act states, "claims administratively disallowed" and states that these claims shall be enforced under the Suits in Admiralty Act. The term "administratively disallowed" is defined in Section *1291 (a)* as a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration.

Here, it would seem that the seaman's common law remedies for claims for personal injuries, that is, common law remedies for claims other than compensation claims or claims which the seaman should elect first to present to the War Shipping Administrator, were saved.

This is more clearly seen when it is born in mind that at the time Public Act 17 was approved, March 24, 1943, seamen had the right, (1) to a libel in personam under the Suits in Admiralty Act, 46 U. S. C. A. § 742, against the War Shipping Administration and the General Agent, (2) and a right to a common law action of damages with or without a jury trial, in personam, against the General Agent,—*Brady* v. *Roosevelt S.S. Co., supra*, (3) whether in addition there was a right to a common law action against the War Shipping Administration, at least a common law action in personam, in cases where the War Shipping Administration was acting in a commercial capacity, we shall later discuss.

Considered with this background Public Act 17 is clear and unambiguous. It provided for prosecution of the libel in personam and saved the common law remedies of seamen against the General Agent.

There is a further consideration necessary in the proper construction of Public Act 17 in view of the fact that the first sentence of the act makes use of the words "employees of the United States" in the expression "Officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall" etc. But the context of the entire first section of the Act makes clear that such seamen were not to have the status of employees of the United States.

The Act had a broader scope than the Suits in Admiralty Act. The latter Act provided in Section 2 that "a libel in personam may be brought against the United States or against such corporation, as the case may be, *provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation.*" Public Law 17, on the other hand provides in its first Section with respect to claims under preceding clause (2) for injuries or under preceding clause (3) for wages "shall if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act *notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act.*

Construing these two provisions, Public Act 17 would seem to apply to public vessels as well as private or merchant vessels. If so undoubtedly Public Act 17 included many seamen who as employees on public vessels would normally be considered as employees of the United States, and the expression then is merely a handy description without being definitive.

The actual definitive part of the first section of Section 1291 (a), the heart of Public Act 17, follows immediately after the broad statement that seaman so employed shall have all the rights of seamen on privately owned or operated American vessels. This definition is that such seamen because of the temporary wartime character of their em-

ployment, shall not be considered as officers or employees of the United States for the purposes of (1) United States Employees Compensation Act, (2) Civil Service Retirement Act, (3) war pay and allowance provisions, (4) provisions for retirement of civil Service employees, (5) provisions for Allowance on death of officers and enlisted men in the Navy, (6) provisions for compensation of employees of contractors outside the United States.

In other words, such seamen were not to be employees of the United States in fact even when employed on a public vessel or warship. The provisions merely operated to afford a large class of seamen a libel in personam against the United States which they would ordinarily not have, being employees in the public service and afforded administrative remedies only.

That seamen employed on vessels operated under a general agency agreement and sustaining injuries as the result of negligence in such operation were intended by Congress to be treated as employees of the operators, appears further in respect of the amending provisions as to insurance made in Public Act 17.

The United States did agree directly to insure vessels against war risks and marine and collision liability. *Ex. O. 9054, Sec. 2 (c), 50 U. S. C. A. App. Sec. page 547; 46 U. S. C. A. §§ 1128a, 1128e(f); 50 U. S. C. A. § 1292; and see Article 8 of the General Agency Agreement.*

As to loss or injury arising out of operation, on the contrary, the United States agreed only to reimburse the general agent, and then only to the extent not covered by insurance. *46 U. S. C. A. § 1202; and see Article 7 of the General Agency Agreement.* Congress, it would seem, intended that the operator should itself insure all operation risks.

There is a vast difference in the mere shifting of loss as in the case of re-insurance, and the prevention of loss as in the case of direct insurance. *See Vicarious Liability and Administration of Risk, 38 Yale Law Journal 584, 601.* Congress must have intended that operators should be responsible and suable for operation losses.

It was the prevention of injury that was the motivating force behind the passage of the Jones Act. The Jones Act was not suggested by negligence attorneys who wished to preserve the right of trial by jury for the sake of any fees yielded by such practice. It was the life-work of Andrew Furuseth, a Commissioner appointed by the President of the United States to the London Conference with regard to safety of life at sea. *See Official Record of Hearings before the Senate Committee on Commerce, Relative to the Establishment of an American Merchant Marine, 66th Cong., 2d. sess., pages 1626 and 1712.*

That the Jones Act is a measure for the protection of health and safety of seamen has been recognized by this Court. *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 378 (1932).

(c) ***Should the Court desire to consider the legislative history of the Act, we believe the proceedings of Congress in relation to H. R. 133 which became Public Act 17 show in the final stage a further evidence of the intent to preserve the common law remedies for injuries of seamen.***

Before the House and the Senate reached agreement on H. R. 133, a joint conference of representatives of both Houses was had as a result of which a Conference Report was prepared and submitted and agreed to by both Houses. *Cong. Record, 78th Cong. 1st Sess., pages 1989, 1919.* Along with the Conference Report there was presented and read by the Clerk of the House a Statement in explanation

thereof, appearing on page 1989 of the Record, from which the following first two paragraphs are quoted:

> "The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 133) to amend and clarify certain provisions of law relating to functions of the War Shipping Administration, and for other purposes, submit the following statement in explanation of the effect of the action agreed upon and recommended in the accompanying conference report as to each of such amendments, namely:
>
> Amendment No. 1: This amendment prescribes limitations on the amounts of attorney's fees in the prosecution and enforcement of claims and suits thereon against the War Shipping Administrator or any of his agents, on account of death, injury, illness, maintenance and cure, loss of effects, detention, or repatriation, wages, allotments, etc., on behalf of seamen (or their dependents) who are employees of the United States through the War Shipping Administration. The House bill contained no similar provision. The Senate recedes."

Here was defeated a limitation of seamen's common law rights which would have made it impossible for a seaman to hire the best legal talent. Furthermore, and more important, the limitation here defeated expressly extended to the action against the General Agent as well as to the War Shipping Administrator.

The defeat of the amendment made clear that seamen were not to be treated as government employees but as "citizens of the United States employed as seamen on privately owned and operated American vessels."

In further confirmation of this view, it may be stated that on the day H. R. 133 was reported for approval of the President, March 17, 1943, the same committee of the House that considered H. R. 133, the Committee on Merchant Marine and Fisheries, announced hearings for March 18, 1943 on H. R. 1361, H. R. 1409, H. R. 1858 which would,

as the announcement stated "have the effect of conferring upon men in the merchant marine the same rights, privileges and benefits accruing to those serving in the armed forces." *Cong. Record, 78th Cong. 1st Sess., page 2182.* These bills do not appear to have been reported out of the Committee.

(d) *The Oregon Court in the reliance placed upon certain language of House Report No. 107 has imputed to Congress an intention concerning the seaman's common law action against the private steamship operator which is not clearly expressed therein and which is contrary to the policy of Public Act 17 as expressly declared in that report.*

It was back of these primary evidences of Congressional intent discussed under previous subheadings that the Oregon Court looked to find the evidences of intent most strongly relied upon, to-wit, the discussion of House Report No. 107 on pages 283-285 of the *Hust* v. *Moore-McCormack* opinion in 158 P. (2d) 275.

In addition to House Report No. 107 (55 pages), we should add, there was a later Senate Report No. 62 (26 pages), both on H. R. 133 of the 78th Congress, besides the Conference Report No. 2572; a pamphlet (unnumbered) entitled "Hearings before the Committee on Merchant Marine and Fisheries * * * September 2, 1942" (34 pages); and two Senate Reports, No. 1655 and No. 1813, all on the predecessor Resolution, H. R. 2474 of the 77th Congress.

In view of the fact, however, that the Oregon Supreme Court had referred to the decision of the New York Supreme Court in the case of *Gay* v. *Pope & Talbot, Inc.*, 47 N. Y. S. (2d) 16, which also considered House Report No. 107 as well as Senate Report No. 1655, and that that was a decision favorable to the petitioners, and that the Oregon Court nevertheless reached a contrary conclusion, we turn

to House Report No. 107 to stress certain features not heretofore noticed.

The passage from House Report No. 107 which the Oregon Court apparently regarded as decisive is that appearing on page 21 of the official report which reads:

> "The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully set forth hereinabove. Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States."

The Oregon Court did not quote the succeeding sentence from that report, which reads:

> "In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942)."

The letter of the Attorney General dated September 14, 1942, does not appear in House Report No. 107. Rather it appears in the pamphlet above referred to as entitled "Hearings * * * September 2, 1942", at page 33 thereof. The letter states in part:

> "My Dear Mr. Bland: At the hearing, September 2, 1942, on H. R. 7424 the suggestion was presented on behalf of the National Maritime Union that an action at law with jury trial should be afforded seamen where claims are asserted against the United States on account of death, injuries, illness, loss of effects, detention, or repatriation.
>
> I have no wish to oppose jury trial in these cases if to the Congress the adoption of such a policy seems wise. There are certain considerations which I think

should be taken into account in reaching your conclusion on the issue of policy involved.

(1) There is no doubt that Mr. Standard in his memorandum has made a strong appeal. I dare say that there is no group to whom we as a Nation owe more in these first months of the war, no group that has borne a larger brunt of the actual conflict than our merchant seamen. Certainly the protection afforded them should be greater, not less, than that which they enjoy in times of peace. * * *"

It would seem from this letter that the only question under consideration was as to an action at law with jury trial against the United States. Such action against a private steamship operator seems not to have been in question and that therefore *the statement in House Report 107 may be taken as applying only to the case in which the seaman sued the United States directly.*

In further explanation of the remarks of the Attorney General in this letter it may be pointed out that the Act as first introduced, i. e., H. R. 7424 (See Appendix Section of this brief) and to which the Attorney General was addressing his remarks, contained the clause "any claim referred to in clause (1) hereof shall if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act."

It is significant also to point out in this letter that which seems to be a recognition by the Attorney General of the main purpose of the Act as regards seamen, in the words: "Certainly the protection afforded them should be greater, not less, than that which they enjoy in times of peace."

His views in this regard agree with the statement of policy appearing on page 19 of the official report of House Report No. 107, where it is stated:

"In addition to these peacetime *remedial* provisions, additional benefits for war conditions are now pro-

vided to all seamen whether private or Government employees under the decisions of the Maritime War Emergency Board." (Emphasis supplied.)

On the title page of the official report of House Report No. 107, appears the following legend: "February 8, 1943. —Committed to the Committee of the Whole House on the state of the Union and ordered to be printed." The opinion of the Supreme Court of the United States in the case of *Brady* v. *Roosevelt S.S. Co.*, it is to be remembered, was rendered on January 18, 1943, so that one of the "peacetime remedies" to which House Report No. 107 refers, and to which it was desired to add additional benefits must be taken to be the suit at law with jury trial against the private steamship agent operator.

No intention should be imputed to Congress after such explicit declarations of gratitude and purpose to give benefits to seamen in addition to those enjoyed in peacetime, that Congress intended in actual practice to give seamen less than they had before.

(e) *This brings us to the question as to whether seamen have a common law action in personam with a jury trial against the United States or the Maritime Commission or the War Shipping Administrator in cases in which there could be held to be an acting in a commercial and not governmental capacity, because if there is a grave question on this score, obviously Congress did not by implication confer any immunity upon a private steamship operator as agent. We believe there is such question.*

The question has its roots in the opinion of Chief Justice Marshall in *Bank of United States* v. *Planters Bank*, 9 Wheat. 904, 907 (1824), where the Chief Justice stated:

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of

that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus many States of the Union who have an interest in Banks, are not suable even in their own Courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the Bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act."

This Court has many times since cited this case and approved this view, some of the cases being, to cite only a few: *Hopkins* v. *Clemson College*, 221 U. S. 636, 647 (1910); *The Lake Monroe*, 250 U. S. 246, 256 (1919); *United States* v. *Strang*, 254 U. S. 491 (1921); *Ohio* v. *Helvering*, 292 U. S. 360, 369 (1934); *Federal Housing Adm.* v. *Burr*, 309 U. S. 242 (1939); *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, 580 (1943).

The fact that the War Shipping Administrator or a Commission acts in the commercial capacity rather than a corporation in which the United States owns all or part of the stock is believed unimportant in this connection. The suability of the corporation seems not to be one of the criteria which determines whether a corporation or a commission or administrator shall be used by the Government in a particular case. 10 *Tulane Law Rev.* 79.

This very eventuality, in fact, was foreseen and considered by Justice Holmes in the case of *Sloan Shipyards* v. *Fleet Corporation*, 258 U. S. 549, 566 (1922), where it is

stated:

> "These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a Constitutional rule of law that exonerates him. *Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if anyone would contend that the Acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court.*" (Emphasis supplied.)

The Fleet Corporation has been dissolved but by the *Merchant Marine Act of 1936* all of its functions, powers and duties were transferred to the United States Maritime Commission. *46 U. S. C. A. §§ 1114 and 1117.*

The question as to whether the government is acting in a commercial or governmental capacity in a particular case, of course, is a matter of considerable difficulty. In *The Lake Monroe, supra*, however, it was held that the carrying of government rationed coal to New England was a commercial venture.

There is then the evidence of Congressional intent as to the question of commercial or governmental character of the business of the merchant marine, whether peacetime or wartime, found in *Section 9* of the *Shipping Board Act of September 7, 1916*, c. 451, 39 Stat. 731, which reads:

> "Every vessel purchased, chartered, or leased from the commission shall, unless authorized by the com-

mission, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

This Section passed prior to the entry of the United States into World War I, still stands unchanged. 46 U. S. C. A. § 808.

That the operation of the American merchant fleet was intended by Congress to be undertaken by private and not governmental interests needs no extended explanation. In the enactment of the Merchant Marine Act of 1920, probably no proposition was more fully discussed and debated in Committee hearings and on the floor of Congress, nor did any measure receive wider public acclaim, even by the Fleet Corporation itself, than that the Government should get out of the business of operating merchant ships. See *Hearings before Senate Committee on Commerce Relative to the Establishment of an American Merchant Marine, supra.*

In view of the foregoing considerations it would seem that there was a good basis for the request of the National Maritime Union that an action at law with a jury trial be afforded seamen against the United States, at least in cases where the United States should be held to be acting in a commercial capacity and through a Commission or Administrator.

The Attorney General in his letter of September 14, 1942, discussed above, concludes that wartime secrecy could be better maintained by a suit in admiralty (see copy of this letter in appendix section of this brief), although as noted above, the Attorney General seems to have been referring only to the action against the United States and not against the operator.

But further than this, as pointed out above under subheading (b), the scope of Public Act 17 being broader than the Suits in Admiralty Act, the conclusion naturally arises that Public Act 17 applied to public vessels or warships. This conclusion adequately explains the attitude of the Navy and the Navy's desire to limit jury trials which the Attorney General's letter of September 14, 1942 discloses.

The jury trial was, of course, a radical departure from the usual procedure against naval vessels. Under the *Public Vessels Act of March 3, 1925*, c. 428, 43 Stat. 112, 46 U. S. C. A. §§ 781-790, a libel in personam was authorized against the United States for damages caused by public vessels, which did not permit seizure of such vessels nor, of course, trials by jury.

Prior to the Navy making known its views, the Attorney General in a letter to the House Committee, dated July 30, 1942 (see copy of this letter in appendix section of this brief), had considered the provisions of H. R. 7424 and stated in conclusion, "I find no objection to the enactment of the bill."

But in any event, there being this grave doubt as to the immunity of the United States or the Maritime Commission or the War Shipping Administrator, there can be little doubt that no immunity for a private steamship operator was intended by Congress.

CONCLUSION

The judgment of the Oregon Supreme Court in the *Hust* case should be reversed.

Respectfully submitted,

SILAS B. AXTELL, Attorney,
15 Moore Street,
Borough of Manhattan,
New York City.

MYRON SCOTT,
of Counsel.

Appendix, p. 1

(Hearings Sept. 2, 1942, title page)

MERCHANT MARINE OMNIBUS BILL

HEARINGS

BEFORE THE

COMMITTEE ON THE MERCHANT MARINE AND FISHERIES HOUSE OF REPRESENTATIVES

SEVENTY-SEVENTH CONGRESS

SECOND SESSION

ON

H. R. 7424

A BILL TO AMEND AND CLARIFY CERTAIN PROVISIONS OF LAW RELATING TO FUNCTIONS OF THE WAR SHIPPING ADMINISTRATION, AND FOR OTHER PURPOSES

SEPTEMBER 2, 1942

Printed for the use of the
Committee on the Merchant Marine and Fisheries

• • • • •

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1942

76923

Appendix, p. 2

(Hearings * * * Sept. 2, 1942, p. 1)

MERCHANT MARINE OMNIBUS BILL

HOUSE OF REPRESENTATIVES,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Wednesday, September 2, 1942.

The committee met at 10 a. m., Hon. Schuyler Otis Bland (chairman) presiding.

The CHAIRMAN. The committee will come to order.

We have met this morning for the consideration of H. R. 7424.

All the reports on the bill which have been received up to this time have been printed and are contained in Document No. 113, copies of which are available to those in attendance.

(H. R. 7424 and reports follow:)

[H. R. 7424, 77th Cong., 2d sess.]

A BILL To amend and clarify certain provisions of law relating to functions of the War Shipping Administration, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled That all seamen employed by or on behalf of the United States through the War Shipping Administration, or agents or other persons acting for or on behalf of the War Shipping Administration, shall, with respect to (1) death, injuries, illness, loss of effects, detention, or repatriation, or claims arising therefrom; (2) the Federal social security laws and Federal employment tax laws; and (3) allotments, have all of the rights, benefits, exemptions, privileges, and liabilities of seamen employed on privately owned and operated American vessels. Such seamen shall

not be entitled to any benefits nor be subject to any charges provided for Federal employees under the United States Employees Compensation Act, as amended, or the Civil Service Retirement Act as amended. Any claim referred to in clause (1) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. The War Shipping Administration, with respect to seamen employed by it or on its behalf, is hereby authorized to make payments by way of contributions, and to make deductions from wages of such seamen, as if an employer under the Federal social security laws and Federal employment tax laws. The War Shipping Administration and its agents or persons acting on its behalf or for its account may, for convenience of administration, with the approval of the Administrator, make payments of any taxes, fees, charges, or exactions to the United States or its agencies.

* * * *

Appendix, p. 4

(Hearings Sept. 2, 1942, p. 3)

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., July 30, 1942.

Hon. SCHUYLER O. BLAND,
Chairman, Committee on the Merchant Marine and Fisheries,
House of Representatives,
Washington, D. C.

MY DEAR MR. CHAIRMAN: This acknowledges your letter of July 24, 1942, requesting my views relative to a bill (H. R. 7424) to amend and clarify certain provisions of law relating to functions of the War Shipping Administration, and for other purposes.

Section 1 of the bill would make applicable to seamen employed by or on behalf of the War Shipping Administration, all the rights, benefits, and immunities that they would have if they were employed on privately owned vessels. It would also expressly provide that such seamen shall not be entitled to any of the benefits or be subject to any of the charges provided for employees of the United States.

Section 2 would amend the law relating to marine insurance in time of war so as to permit the War Shipping Administration to furnish protection to seamen which would include all marine risks which seamen might encounter in wartime; for example, injuries sustained in collisions in convey due to black-out conditions.

Section 3 (a) would authorize the War Shipping Administration, prior to making a definite determination of just compensation, to make a deposit with the Treasurer of the United States on account of such just compensation for foreign merchant vessels which it requisitioned.

Under existing law (act of April 1, 1942, Public Law No. 523, sec. 223) the amount of commissions and expenses which may be allowed by the War Shipping Administration to an insurance carrier for commissions and expenses on reinsurance is restricted to a fixed percentage of the premiums. Section 3 (b) of the bill under consideration would remove this restriction so far as expenses are concerned.

Section 3 (c) of the measure would authorize any department or agency of the United States to procure insurance against marine risks on hulls in which the United States has a legal or equitable interest. Sections 3 (d) and (e) would merely clarify certain ambiguities in existing law relating to the insurance of the interest of a general agent for a vessel and the insurance of certain classes of vessels acquired by the War Shipping Administration.

Section 4 would accord to the United States in respect to all vessels under the control of the War Shipping Administration, the same rights to limit liability and to receive benefits as is accorded to owners of private vessels.

Section 5 would provide that section 1 of the bill shall remain in force until 6 months after the termination of the war or until such earlier date as the Congress by concurrent resolution or the President by proclamation may designate.

I find no objection to the enactment of the bill.

Sincerely yours,

FRANCIS BIDDLE,
Attorney General.

Appendix, p. 6

(Hearings * * * Sept. 2, 1942, p. 33)

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., September 14, 1942.

Hon. SCHUYLER O. BLAND,
Chairman, Committee on the Merchant Marine and Fisheries,
House of Representatives,
Washington, D. C.

MY DEAR MR. BLAND: At the hearing, September 2, 1942, on H. R. 7424 the suggestion was presented on behalf of the National Maritime Union that an action at law with jury trial should be afforded seamen where claims are asserted against the United States on account of death, injuries, illness, loss of effects, detention, or repatriation.

I have no wish to oppose jury trial in these cases if to the Congress the adoption of such a policy seems wise. There are certain considerations which I think should be taken into account in reaching your conclusion on the issue of policy involved.

(1) There is no doubt that Mr. Standard in his memorandum has made a strong appeal. I dare say that there is no group to whom we as a Nation owe more in these first months of the war, no group that has borne a larger brunt of the actual conflict than our merchant seamen. Certainly the protection afforded them should be greater, not less, than that which they enjoy in times of peace. The attempt has been made to cover war risks by insurance. If it is thought that coverage is not adequate (a matter on which I am not sufficiently informed to express a judgment) one would expect the remedy to be sought at that point. At least it seems to me it should be pointed out that the hope

of large jury verdicts on account of marine risks must of necessity be a haphazard and accidental approach rather than a sure approach to satisfying seamen's rights to security for themselves and their families on account of injuries or death that may result from the risks of war.

(2) It has been found necessary in protecting the security of the Nation to adopt an amendment to admiralty rule 46. It has been found that in the course of admiralty litigation information is made available to the enemy detrimental to the national safety and detrimental to the lives and welfare of seamen. The amendment to admiralty rule 46 contemplates careful surveillance of admiralty litigation and control of the proceedings to prevent leakage of information that might be of value to the enemy and of danger to the United States. The scheme of this protection is that every libel is submitted to me; and my assistants, in collaboration with appropriate officers of the Navy, examine the litigation. If the Navy Department is of the view that information stated in the pleadings or liable to be developed in the course of the trial would be of value to the enemy, admiralty rule 46 authorizes the court to impound the pleadings, to hold the trial in camera and to impound all records in the proceedings. It is possible for this to be effective if the matter is heard by a judge. It is much more difficult for it to be effective if it is tried before a jury, and, of course, the rule will not apply if the action is at law. Obviously in trial of cases on claims asserted by seamen because of death, injury, illness, loss of effects, detention, or repatriation, disclosures regarding formation and operations of convoys, routes, protection for shipping, etc., might well be made in the course of trial.

(3) It is to be noted that claims against the United States under the Tucker Act, under the Suits in Admiralty Act, under the Public Vessels Act, are tried by the judge

alone. Congress has rarely allowed a jury trial in suits against the United States.

(4) It is further to be noted that these cases will have to be tried largely on depositions. Judges are better qualified by experience than juries to appraise the value of evidence presented in the form of depositions.

Sincerely yours,

FRANCIS BIDDLE, *Attorney General.*

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 625

CECIL I. HUST, PETITIONER

v.

MOORE-MCCORMACK LINES, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States files this memorandum *amicus curiae* because of the importance of the question presented in the administration of government-owned shipping, both retroactively during the war just ended and prospectively during the further operation of such shipping. The War Shipping Administration has requested the Attorney General to advise the Court of the Government's interest and position with regard to the problem.

As will appear, Public Law 17, enacted March 24, 1943 (57 Stat. 45, 50 U. S. C. App., Supp. IV, 1291) is a specific enactment covering, among

other things, liability for injuries sustained by merchant seamen on government-owned vessels.[1] Although the injury to petitioner occurred before the adoption of Public Law 17, that Act is pertinent because it is declaratory of the previously understood law and practice with respect to the incidence of liability for injuries, and the decision in the present case will probably determine whether similar suits can be maintained with reference to the subsequent period as well as the period before the Act. Congress recognized and intended, we believe, that liability in cases like the present should fall upon the United States and not upon steamship companies which, like respondent, are general agents of the United States in connection with the operation of vessels. It is the position of the Government, therefore, that petitioner was an employee of the United States and that respondent is not liable as his employer. No question of possible liability of the respondent as agent for an independent tort growing out of its own negligence (Cf. *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, 581, 582) is presented (see the opinion of the court below at R. 32–33, 37), since the action was brought under Section 33 of the Jones Act (41 Stat. 1007, 46 U. S. C. 688) against the alleged employer as such (R. 5, 14).

[1] Certain vessels have been operated during the war period under time charters by their owners to the War Shipping Administration. No question of liability to seamen employed on such vessels is here presented.

The S. S. Mark Hanna, upon which petitioner was injured, was a liberty ship owned by the United States and operated through the War Shipping Administration. The experience and facilities of Moore-McCormack were utilized in connection with the operation of the ship by means of a standard general agency agreement which specifically provided, as emphasized by respondent herein (Br. 5) and by the court below (R. 15), that the master of the vessel should be the agent and employee of the United States and that the crew should be employed by the master (R. 151). Petitioner was so employed (R. 142).

As of V-J Day, approximately 4,300 merchant ships were operated by the War Shipping Administration, as compared with the pre-war American merchant marine available for deep-sea service of 1,375 vessels.[2] At the close of the war, approximately 220,000 men were needed for the merchant marine as compared with the pre-war requirement of 55,000 officers and men for off-shore commerce.[3] On and after April 19, 1942, the United States, through the War Shipping Administration, was the owner or bareboat charterer of the vast bulk

[2] This expansion, despite war losses, is more than accounted for by the Maritime Commission's wartime ship construction of 5,220 ships. The title to these ships vested, of course, in the United States and their effective operation was the main objective of the general agency scheme.

[3] Under various statutory powers, the War Shipping Administration's Training Organization trained and sent to sea more than 168,000 men between Pearl Harbor and V-J Day.

of these merchant ships, which it operated under general agency agreements similar to that in this case, and considered itself the employer of the merchant seamen engaged in their operation.[4] Thus, the question of the status of merchant seamen in the most important category of wartime merchant fleet operation for purposes of recovery for personal injury is here presented for decision.

Early in 1941, the United States Maritime Commission began the development of a shipping pool for use in carrying critical and strategic materials needed for national defense. Initially, participation in the shipping pool was voluntary on the part of ship owners, and the employment relation between ship owners and seamen was in no way disturbed. After December 7, 1941, an effort was made to harness merchant shipping closely to war operations by means of contracts. It became apparent, however, in view of the critical role played by transportation, that central control of the American merchant marine and complete coordination of its activities were vital.

[4] Figures supplied by the United States Maritime Commission to the social security technical staff of the Committee on Ways and Means of the House of Representatives show that as of June, 1945, 146,460 individuals were engaged in maritime employment in connection with general agency agreements of the War Shipping Administration, out of a total of 173,060 employees on American-flag vessels. See Hearings before the Committee on H. R. 3736, 79th Cong., 1st sess., p. 703.

A single fluid pool of shipping was needed to permit maximum flexibility and efficiency in the assignment of ships and the allocation of vessel space.[5] Accordingly, on April 19, 1942, the Administrator of War Shipping gave notice of general requisition of all ocean-going vessels.[6] As the result of this general requisition and the maritime war construction program, the War Shipping Administration, after that date, was the owner or bareboat charterer of the vast majority of ships operated in the American merchant marine. Ultimate control, flexibility and uniformity were achieved by the Government's status as owner or bareboat charterer. By means of general agency agreements, identical with that here involved, the War Shipping Administration was able to utilize, under its active supervision and direction, existing facilities of the experienced steamship companies.[7]

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[5] H. Rep. No. 107, 78th Cong., 1st sess., pp. 12–13.

[6] Executive Order No. 9054 of February 7, 1942, 7 F. R. 837, created the War Shipping Administration and delegated to the Administrator the power to coordinate, manage, and control the operation, purchase, charter, requisition and use of the ocean-going transportation facilities of the nation for the purposes stated in the text.

[7] The development of adequate shipping experience and facilities was a major purpose of the pre-war program for developing and expanding the American merchant marine, and the wartime utilization of such facilities by the War Shipping Administration in connection with the wartime operation of the merchant fleet was specifically commended in Congress. H. Rep. 107, 78th Cong., 1st Sess., p. 14.

Although this utilization of private steamship companies necessarily required the exercise of discretion by them as agents for many day-to-day purposes, the position of the Government as employer was explicitly recognized and its responsibilities as such were fully assumed, both generally and in relation to liability for personal injuries. It is this practical functioning of the arrangement, permitting "* * * a quick change-over from peacetime to wartime operations of the entire merchant marine without any substantial loss of efficiency or impairment of morale * * *" (H. Rep. No. 107, *supra*, p. 5), upon which petitioner seeks to base his contention that he can maintain a Jones Act suit as an employee of the respondent. This contention, however, conflicts with the terms of the shipping articles which he signed (R. 17, 142), with the applicable provisions of the general agency agreement (see *supra*, p. 3), and with the clear understanding and purpose of Congress and of the War Shipping Administration.

All general agency agreements, of which the one here involved is typical, charters, policies, operations regulations and directives to general agents, contracts, and insurance and other arrangements used by the War Shipping Administration were drafted and executed on the basis that merchant seamen of the class represented by the petitioner

herein were employees of the United States.[8] Other government agencies have regarded these crew members as employees of the United States. For example, the United States Employees' Compensation Commission granted benefits to seamen of this class under the Employees' Compensation Act (39 Stat. 742, 5 U. S. C. 751 *et seq.*) in cases arising prior to the Act of March 24, 1943, *supra*. See the Commission's 28th Annual Report (1944), p. 5. The authorities of a number of States which provide coverage for maritime workers in their unemployment compensation laws have refrained from collecting contributions with respect to workers on vessels operated by the War Shipping Administration through general agents, since "it is generally understood that * * * [such] workers * * * are considered to be Federal employees." Op. cit. *supra*, n. 4, pp. 703–705. If petitioner's contention is sustained, the Govern-

[8] Standard forms of the contracts, charters, and insurance arrangements are contained in a *Compilation of Standard Contract Forms of the War Shipping Administration*, compiled by the Merchant Marine and Fisheries Committee of the House of Representatives (Document No. 4). Also important in this connection is a Statement of Policy executed on May 4, 1942, by the War Shipping Administration and a number of maritime unions, including the one to which petitioner belonged (see R. 24), covering certain aspects of maritime labor relations during the war period, in which it is stated that the intention of the general agency agreement clause covering the hiring of crew members "is that the General Agent will procure and make available to the Master for engagement by the Master, officers and men * * *" (R. 167).

ment will be faced with the question whether contributions should be made to such state funds retroactively for the period of the war, as well as prospectively.

Public Law 17 of March 24, 1943 (see *supra*, p. 1) provides (§ 1, 50 U. S. C., App. Supp. IV, 1291) that "officers and members of crew * * * employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration * * * shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act," but that their claims for personal injury or death "shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act * * *." There can be no doubt that as to such suits for personal injuries to seamen on merchant vessels "owned by or bareboat-chartered to the War Shipping Administration" the Act was viewed as declaratory of pre-existing law. (S. Rep. No. 62, 78th Cong., 1sf sess., p. 5; see also *idem*. p. 11; H. Rep. No. 107, 78th Cong., 1st sess., pp. 2, 16.) A complete survey and approval of the War Shipping Administration's operation of the bulk of the merchant fleet is contained in the cited committee reports. The reports leave no doubt that the status of merchant seamen, such as petitioner, as employees of the United States is recognized.

H. Rep. No. 107, *supra*, pp. 2, 15 ff., 22–24; S. Rep. No. 62, *supra*, pp. 5–6.[9]

In respect to personal injury and death claims the over-all purpose of the legislation is stated to be to confirm the rights of these seamen on the same basis as seamen in private employment. H. Rep. No. 107, *supra*, pp. 2–3, 15, 20; S. Rep. No. 62, *supra*, pp. 5–6, 11. However, provision is made that suits to enforce such rights, being against the United States, shall be brought under the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 741 *et seq.*), and the right to institute such suits is conditioned on prior administrative consideration and disallowance of claims in accordance with regulations prescribed by the War Shipping Administrator.[10] See § 1, quoted *supra*, and the further provision that "'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator * * *." Compare *Fox v. Alcoa Steamship Co.*, 143 F. 2d 667 (C. C. A. 5), certiorari denied, 323 U. S. 788; *United States* v.

[9] Recent congressional recognition of the status, as employees of the United States, of merchant seamen such as petitioner is contained in *Issues in Social Security*, Report to the Ways and Means Committee of the House of Representatives by the Committee's Social Security Technical Staff pursuant to H. Res. 204, 79th Cong., 1st Sess., p. 401; Hearings before Ways and Means Committee, on H. R. 3736, 79th Cong., 1st Sess., p. 704.

[10] Such rules and regulations are embodied in General Order No. 32, 8 F. R. 5414.

Sherwood, 312 U. S. 584; *Bono* v. *United States*, 113 F. 2d 724 (C. C. A. 2); *Griffin* v. *United States*, 60 F. 2d 339 (C. C. A. 7); *Blanton* v. *United States*, 17 F. Supp. 327, 328 (S. D. Ala.). These remedies were clearly regarded as exclusive. See H. Rep. No. 107, at p. 21: "The only modification [of seamen's rights on government as compared with private vessels] arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States." To permit the alternative remedy of suit against a general agent would go counter to the legislative understanding and purpose and, as to the period subsequent to the adoption of Public Law 17, would circumvent the requirement of prior administrative consideration which the statute imposes.

Even prior to the statute, the War Shipping Administrator had taken substantial steps to insure to merchant seamen who were employees of the United States their pre-existing rights insofar as the basis of such rights was compatible with their status as government employees and with the requirements of the wartime operation of the merchant marine. In devising a program to accomplish its objectives, the War Shipping Administration, after its creation on February 7, 1942, kept definitely in view the fact that American merchant seamen are civilians, engaged

in voluntary contractual employment, and that the operation of the merchant marine, however vital and closely allied to the military and naval activities, was to be conducted as a civilian enterprise. The handling of collective bargaining, here brought in issue by petitioner's reference to decisions of the National Labor Relations Board (interim or examiner's report) and the War Labor Board, illustrates such efforts.

Wages and working conditions of a majority of merchant seamen privately employed on dry cargo vessels had been established by collective bargaining agreements between ship owners and maritime labor organizations. As vessels owned by or bareboat chartered to the Government appeared in increasing numbers beside privately owned and operated ships, the War Shipping Administrator considered that existing wages, working conditions, and employment contracts established by collective bargaining for the privately owned vessels should obtain as to government vessels operated under the general agency scheme. This was the intended effect of certain Statements of Policy signed by the Administrator and nine maritime unions in May and June, 1942 (see *supra,* n. 8), to which both petitioner and respondent herein have referred.[11] These State-

[11] The War Shipping Administration has taken the position that these Statements of Policy constituted approval of all maritime collective bargaining agreements, not merely those of signatory unions.

ments of Policy were promptly implemented by a series of policies, regulations and directives, so that uniformity should be achieved.

One aspect of the labor relations problem involved the designation of bargaining units. To meet this problem, an exchange of correspondence (printed in the Appendix, *infra,* pp. 15–36) took place between the War Shipping Administration and the National Labor Relations Board, whereby the Administrator exercised his power to utilize the facilities of the National Labor Relations Board for the designation of bargaining units. The War Shipping Administration's rights with respect to the Board's possible jurisdiction over personnel aboard vessels owned by or bareboat chartered to the War Shipping Administration were specifically reserved. (See *infra,* pp. 19, 21, 23, 26, 29.) These solutions of the collective bargaining problem were specifically considered and approved by Congress in connection with its consideration of the Act of March 24, 1943, *supra.* H. Rep. No. 107, *supra,* pp. 15–17, 23–24.[12] A similar practical arrangement was made in connection

[12] The participation of the War Shipping Administrator, as a signatory of the Statement of Principles, in the activities of the Maritime War Emergency Board in connection with questions of special compensation and bonuses for merchant seamen, was also noted and approved by Congress. H. Rep. No. 107, *supra,* at p. 17. The Maritime War Emergency Board was established on December 18, 1941, by agreement of private ship operators and maritime labor organiza-

with the functioning of the National War Labor Board.

The material set forth above serves to illustrate the complex nature of the vital operation in which the War Shipping Administration has been engaged and the practical solutions which have been given to the problems which that Administration faced as it "* * * actively engaged in operating * * * the largest merchant marine in the world's history. * * *" H. Rep. No. 107, *supra*, at p. 12. At all times during this operation, the legal relationship of employer and employee between the United States and merchant seamen of the class represented by petitioner has been specifically maintained.

Petitioner is deprived of no substantial right by being required to vindicate his claim in a Jones Act suit against the United States under the Suits in Admiralty Act rather than in a suit against the general agent. The problem presented has been given exceedingly careful consideration by the

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tions to deal with problems of war compensation and bonus problems which could no longer be adequately solved by the parties because of the lack of current, accurate information. The memorandum of agreement was designated "Statement of Principles." The War Shipping Administration became the signatory when it began to operate a substantial portion of the merchant fleet. It should be noted that the War Labor Board advised the Maritime Emergency Board that its bonus decisions need not be submitted to the former agency for stabilization review.

Supreme Court of Oregon, and we respectfully submit that its judgment should be affirmed.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
RALPH F. FUCHS,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
SAMUEL D. SLADE,
Attorneys.

APRIL 1946.

APPENDIX

The correspondence between the War Shipping Administration and the National Labor Relations Board, referred to above at p. 12 is as follows:

WAR SHIPPING ADMINISTRATION,
Washington 25, D. C., October 20, 1942.

NATIONAL LABOR RELATIONS BOARD,
Washington, D. C.

GENTLEMEN: As you know, one or two cases recently have arisen in which maritime labor unions have sought to invoke the jurisdiction of your Board under the National Labor Relations Act in matters involving either in whole or in part personnel employed on vessels owned by or under bareboat charter to the War Shipping Administration. Similar matters may arise in the future.

As you are undoubtedly aware, the War Shipping Administration, on April 8, 1942, requisitioned substantially all of the vessels in the American Merchant Marine with certain minor exceptions. These vessels are in addition to the substantial number of vessels constructed and owned by the government. The vessels requisitioned fall into two classes: (1) those requisitioned under bareboat charters which place the War Shipping Administration in substantially the same status as with respect to other vessels owned outright by the government, and (2) those

requisitioned under time charters. All vessels owned or requisitioned under bareboat or time charter basis by the War Shipping Administration have been assigned to various steamship companies for operation under agency agreements. Those vessels owned by or bareboat chartered to the War Shipping Administration are operated by steamship companies under what is known as a General Agency Agreement. Those vessels which are under time charter are operated by various steamship companies under what is known as a Time Charter Agency Agreement. While the charter and agency agreements of the nature mentioned are not uniform in all details, they are substantially the same with respect to the provisions governing the subjects discussed in this letter.

For your more complete information there is attached a copy each of our Requisition Bareboat Charter for Cargo and Tank Vessels, Requisition Time Charter for Dry Cargo Vessels, Requisition Time Charter for Tank Vessels, General Agency Agreement (applicable to the operation of vessels owned by or bareboat chartered to the War Shipping Administration), and our Time Charter Agency Agreement (applicable to the operation of vessels under time charter to the War Shipping Administration).

It will be noted that under Clause 1 of Part II of both forms of time charters mentioned above, the owner is required to deliver the vessel to the charterer with a "Master and a full complement of officers and crew." Under Clause 6 it is provided that the owner shall provide and pay for "wages of * * * and other expenses pertain-

ing to, the Master, officers and crew (except as herein otherwise provided)." It should also be noted that by virtue of Article 3A (c) of the Time Charter Agency Agreement the agent is required to provide and pay for various expenses "except those pertaining to the Master, officers and crew." Under the arrangement provided for by these time charter and time charter agency agreements, as illustrated by the aforementioned provisions, the Master, officers and crew members of vessels time chartered to the War Shipping Administration are employees of the owner and not the charterer.

A different situation exists in regard to personnel employed aboard vessels owned by or bareboat chartered to the War Shipping Administration. In this connection we wish to call your attention to the provisions in Clause 14 of Part II of the Bareboat Charter for Cargo and Tank Vessels mentioned above which reads as follows:

> During the period hereof, the Charterer shall at its own expense, or by its own procurement, man, victual, navigate, operate, supply, fuel and repair the Vessel and pay all charges and expenses of every kind and nature whatsoever incident thereto. The Charterer and not the Owner shall have exclusive possession, control and command of said Vessel during the entire period of this Charter.

It should also be noted that under Article 1 of the General Agency Agreement, under which vessels owned by or bareboat chartered to the War Shiping Administration are operated, the general agent acts as the agent of the United States and not as an independent contractor in the management and conducting of the business of the vessels

assigned to it by the United States. The following provisions contained in Article III–A (d) are also called specifically to your attention:

> * * * The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. * * * The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.

Under Article 7 provision is made for the reimbursement of the general agent by the United States for all crew expenditures, including disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, insurance premiums, payments under any applicable pension fund, Social Securitity Taxes, etc.

The War Shipping Administrator has been advised that under the contractual arrangements mentioned above and for other reasons, the Master, officers and members of the crew of all vessels owned by or bareboat chartered to the War Shipping Administration are employees of the United States and particularly of the War Shipping Administration, and are so consid-

ered and treated at the present time by other governmental departments and agencies for the purposes of the Civil Service Retirement Act, the United States Employees' Compensation Act, the Federal Social Security Laws, and the Federal Employment Tax laws. Furthermore, the wages of such personnel are exempt from attachment as government employees. The War Shipping Administrator has also been advised that Section 2 of the National Labor Relations Act provides that the term "employer" shall not include the United States.

Under these circumstances, the War Shipping Administration cannot take a position that the National Labor Relations Board has jurisdiction under the National Labor Relations Act of the personnel aboard vessels owned by or bareboat chartered to the War Shipping Administration, and it is assumed that your Board, for like reasons, will not assert jurisdiction over these employees.

We are fully cognizant, however, of the services that your Board can render out of the abundance of your experience and trained staff in the solution of personnel problems which, except for the circumstances mentioned above, would ordinarily fall within the scope of the National Labor Relations Act. We are also generally advised of the satisfactory working arrangements which have been agreed upon between your Board and the War and Navy Departments under circumstances which, to some extent, may be analogous to those above described.

Enclosed for your further information is a copy of the Executive Order of the President dated

February 7, 1942, establishing the War Shipping Administration. Paragraph 5 of the Executive Order reads as follows:

> For the purpose of carrying out the provisions of this Order, the Administrator is authorized to utilize the services of available and appropriate personnel of the United States Maritime Commission, the War and Navy Departments, the Bureau of Marine Inspection and Navigation of the Department of Commerce, and other government departments and agencies which are engaged in activities related to the operation of shipping.

Paragraph 8 of the same Order reads in part as follows:

> * * * The Administrator may exercise the powers, authority and discretion conferred upon him by this Order through such officials or agencies and in such a manner as he may determine.

The War Shipping Administration is desirous of adopting the most feasible and practicable method of dealing with problems which may arise and relate to the personnel of vessels owned by or bareboat chartered to it. As an illustration of what has already been done in this respect, copies of Statements of Policy entered into between the War Shipping Administration and the various maritime unions are also enclosed.

By virtue of the authority granted under the provisions of the Executive Order quoted above, the Administrator may utilize in behalf of the War Shipping Administration the advice, services and assistance which may be furnished by other

appropriate governmental departments and agencies to the end that the operations of vessels by the War Shipping Administration may be conducted at maximum efficiency and without interference and interruptions which might otherwise occur. For these reasons the value of the advice and assistance of the National Labor Relations Board is recognized in matters relating to the designation of collective bargaining representatives, and to such other problems falling within the scope of the National Labor Relations Act as the War Shipping Administration may determine such advice and assistance is required. Of course, if your Board sees fit to furnish this advice and assistance to the War Shipping Administration, it should be understood that in the state of its advice the War Shipping Administration is compelled not to recognize that the National Labor Relations Board has jurisdiction over employees of the War Shipping Administration and that this question shall be reserved for future determination and adjudication in the event it should ever become pertinent and material in any proceeding or case.

As a means of obtaining a satisfactory arrangement for the adjustment of problems arising during the war emergency, I suggest the following arrangement be entered into:

1. The National Labor Relations Board, in its customary manner, will conduct elections and otherwise act in the designation of collective bargaining representatives and in the adjustment of other problems which may involve personnel of vessels owned by or under bareboat charter to the War Shipping Administration.

2. The War Shipping Administration will be given notice of all proceedings which are instituted with the Board affecting our personnel or operating agents. Whenever a petition for certification of representatives under Section 9 (c) of the National Labor Relations Act is instituted, and whenever a charge alleging the commission of an unfair labor practice under that Act is filed, the Regional Director of your Board, in addition to notifying our operating agent immediately concerned, will also send a copy of such notification to the War Shipping Administration, Washington, D. C. The War Shipping Administration will likewise instruct all of its operating agents to give us a similar notice whenever a petition or charge of this nature has been filed. The Regional Directors of your Board will likewise transmit to us copies of complaints and petitions in proceedings commenced under the National Labor Relations Act which involve any of our operating agents.

3. The War Shipping Administraion will be placed in a position to contribute facts, some of which may be of a confidential or secret nature, which are relative to the Board's consideration of a case or proceeding under the suggested arrangement.

4. A close liaison shall be maintained between the National Labor Relations Board and the War Shipping Administration in connection with activities of your Board and the War Shipping Administration under this arrangement including conferences relating to the problem of a formula whereby determinations of collective bargaining agents will not be made until a truly representa-

tive number of vessels are assigned to our respective operating agents and a correspondingly representative number of personnel are engaged aboard such vessels, and whereby the status of collective bargaining agents, once determined, shall not be subject to too frequent challenge or change so as to interfere with the proper and efficient operation of vessels in the furtherance of the war effort.

5. The War Shipping Administration under this arrangement shall be considered as having reserved its rights with respect to the jurisdiction of the Board over personnel aboard vessels owned by or bareboat chartered to the War Shipping Administration.

Sincerely yours,

(Sgd.) E. S. Land,
E. S. LAND,
Administrator.

NATIONAL LABOR RELATIONS BOARD,
Washington, D. C. October 26, 1942.

Admiral E. S. LAND,
Administrator,
War Shipping Administration,
Washington, D. C.

DEAR SIR: The Board has considered your letter of October 20, 1942 and is most anxious to cooperate with the War Shipping Administration in a wholehearted mutual endeavor to adjust problems within the jurisdiction of the Board incident to personnel in the Merchant Marine. To that end the Board would welcome an understanding with the War Shipping Administration whereby on the one hand the Board would ad-

minister and apply the National Labor Relations Act to seamen aboard merchant vessels irrespective of the types of charter or agreement under which such vessels operate and, on the other hand, with the understanding that the War Shipping Administration wishes to reserve the legal question whether the Board has jurisdiction with respect to personnel aboard vessels owned by or bareboat chartered to the War Shipping Administration.

The Board is advised by its counsel that no final determination is possible at the present time concerning the jurisdiction of the Board with respect to such personnel. It would appear that so vital a question could not ultimately and decisively be determined in the absence of a full hearing in which the employees, the operators and the War Shipping Administration could present evidence upon which the Board and the courts could make such a determination.

Nevertheless, the Board is deeply aware of the need for prompt and effective disposition of problems arising in the field of labor relations during the war emergency. Hence, the Board feels that to the extent that litigation can be avoided, the objectives of all would be best served.

As a means of obtaining a satisfactory arrangement for the adjustment of problems arising during the war emergency, the National Labor Relations Board will enter into the following arrangement with the War Shipping Administration:

1. The Board, in its customary manner, will conduct elections and otherwise act in the designation of collective bargaining representatives

and in the adjustment of other problems which may involve personnel of vessels owned by or under bareboat charter to the War Shipping Administration.

2. The War Shipping Administration will be given notice of all proceedings which are instituted with the Board affecting the personnel of vessels owned by or under bareboat charter to the War Shipping Administration. Whenever a petition for certification of representatives under Section 9 (c) of the National Labor Relations Act is instituted, and whenever a charge alleging the commission of an unfair labor practice under that Act is filed, the Regional Directors of the Board, in addition to notifying the operating agent immediately concerned, will also send a copy of such notification to the War Shipping Administration, Washington, D. C. The War Shipping Administration will likewise instruct all of its operating agents to notify it whenever a petition or charge of this nature has been filed. The Regional Directors of the Board will likewise transmit to the War Shipping Administration copies of complaints and petitions in proceedings commenced under the National Labor Relations Act which involve any of the operating agents.

3. The War Shipping Administration will be in a position to contribute facts, some of which may be of a confidential or secret nature, which are relative to the Board's consideration of a case or proceeding under the suggested arrangement.

4. A close liaison shall be maintained between the National Labor Relations Board and the War Shipping Administration in connection with activities of the Board and the War Shipping Ad-

ministration under this arrangement, including conferences relating to the problem of a formula whereby determinations of collective bargaining agents will not be made until a truly representative number of vessels are assigned to your respective operating agents and a correspondingly representative number of personnel are engaged aboard such vessels, and whereby the status of collective bargaining agents, once determined, shall not be subject to too frequent challenge or change so as to interfere with the proper and efficient operation of vessels in the furtherance of the war effort.

In the conclusion, the National Labor Relations Board understands that the War Shipping Administration under this arrangement shall be considered as having reserved its rights with respect to the jurisdiction of the Board over personnel aboard vessels owned by or bareboat chartered to the War Shipping Administration.

Sincerely yours,

(Sgd.) H. A. Millis,
H. A. Millis.

War Shipping Administration,
Washington 25, D. C., March 30, 1943.

National Labor Relations Board,
Washington, D. C.

Gentlemen: Reference is made to the exchange of correspondence between the National Labor Relations Board and the War Shipping Administration, copies of which are attached.

The War Shipping Administration is advised that some questions have arisen in relation to elections being conducted by your Board on ves-

sels operated by General Agents of the War Shipping Administration. In some instances, the General Agent may operate vessels only under time charter; in other instances, the General Agent may operate vessels only under bareboat charter or general agency agreement; and in still other cases, the General Agent may engage in both types of operations, that is, he may operate vessels both under time charter and also under bareboat charter and general agency agreement. In this last mentioned type of operation, employees who had been originally employed by the General Agent prior to the requisition may find themselves employed on bareboat chartered or government-owned vessels; and new employees may find themselves indiscriminately employed on vessels operated under both types of charter or general agency agreement.

The controlling purpose of the exchange of correspondence between the National Labor Relations Board and the War Shipping Administration was to utilize, in the successful operation of the American Merchant Marine by the War Shipping Administration, the experience and trained personnel of the National Labor Relations Board in the field of its customary jurisdiction. What is the unit appropriate for the purposes of collective bargaining in such a matter. The War Shipping Administration therefore expresses no views as to what the appropriate unit is or how these elections shall be conducted beyond stating that the War Shipping Administration has no objection if the National Labor Relations Board should conclude to treat all of the personnel under the immediate direction of a general agent as an

appropriate unit, irrespective of the form of charter arrangement, and irrespective of conclusions whether a given employee is employed by the War Shipping Administration or the operator.

Sincerely yours,

(Sgd.) E. S. Land,
E. S. LAND,
Administrator.

NATIONAL LABOR RELATIONS BOARD,
Washington, D. C., September 14, 1943.

Admiral E. S. LAND,
Administrator,
War Shipping Administration,
Washington, D. C.

Re: *American-Hawaiian Steamship Company,* Case No. R–3688.

DEAR SIR: Reference is made to your letter of October 20, 1942, and the reply of the National Labor Relations Board dated October 26, 1942, relating to the exercise by the National Labor Relations Board of jurisdiction over personnel aboard vessels owned by or bare-boat chartered to the War Shipping Administration.

The proceeding referred to above is pending before the Board on a petition for investigation and certification of representatives for employees of American-Hawaiian Steamship Company. The case squarely presents the legal question whether the National Labor Relations Board has jurisdiction with respect to personnel aboard vessels owned by or bare-boat chartered to the War Shipping Administration and which the aforesaid

Company has been assigned for operation and servicing pursuant to the general agency agreement with the War Shipping Administration. The Company has taken the position that personnel aboard such vessels are employees of the United States, and that in consequence the National Labor Relations Board has no jurisdiction under the National Labor Relations Act. For the formal record in this proceeding, the National Labor Relations Board requests that the War Shipping Administration state whether or not the personnel involved in the instant case are regarded by the War Shipping Administration as employees of the United States.

Sincerely yours,

(Sgd.) H. A. Millis.
HARRY A. MILLIS.

WAR SHIPPING ADMINISTRATION,
Washington 25, D. C., November 9, 1943.

NATIONAL LABOR RELATIONS BOARD,
Washington, D. C.

GENTLEMEN: This acknowledges your letter of September 14, 1943, concerning the American-Hawaiian Steamship Company, your Case No. R-3688, in which the National Labor Relations Board requests that the War Shipping Administration state whether or not the personnel involved are regarded by the War Shipping Administration as employees of the United States.

The desirability of reserving this question, without interruption or interference with the processes of the National Labor Relations Board, was the basis of our exchanges of correspondence, copies of which are attached.

At the outset, I should like to make it clear that the War Shipping Administration considers this arrangement to be most helpful, and hopes that it may be continued. Moreover, from the standpoint of the War Shipping Administration, action by the National Labor Relations Board, in accordance with its usual procedures, for the settlement of whatever difference may exist between American-Hawaiian Steamship Company and the personnel employed on board vessels owned by or bareboat chartered to the Administration and operated by the Company as agent for the Administration, would be in conformity with the arrangement referred to. Also such action by the Board would appear to be in conformity with its decisions in the cases of the Cosmopolitan Shipping Company, Inc., 2 N. L. R. B. 759, America France Line et al., 3 N. L. R. B. 64, and Southgate Nelson Corporation, 3 N. L. R. B. 535.

Your letter of September 14, 1943, however, asks for a statement as to whether the personnel involved in this proceeding are regarded by the War Shipping Administration as employees of the United States. In this connection, we are in agreement with the statement in your letter of October 26, 1942 as follows:

> It would appear that so vital a question could not ultimately and decisively be determined in the absence of a full hearing in which the employees, the operators and the War Shipping Administration could present evidence upon which the Board and the courts could make such a determination.

Therefore, instead of attempting to state legal conclusions, we submit such facts as are known

by the War Shipping Administration to have a bearing on the problem in addition to those outlined in our prior exchanges of correspondence.

The Executive Order creating the War Shipping Administration contemplates the operation of the American Merchant Marine as a civilian enterprise. In the exercise of its various functions and in the conduct of its activities, the War Shipping Administration in general is authorized to operate with the powers of a business or a commercial organization under the provisions of the Merchant Marine Act of 1936. These activities are so broad and the need for emergency action has been so great that the Administrator cannot function with the usual restrictions applicable to government agencies.

At the time of our letter of October 20, 1942, and as stated therein, we were advised that the personnel in question were employees of the United States and were then so considered and treated by other governmental departments and agencies for the purposes of the Civil Service Retirement Act, the United States Employees Compensation Act, the Federal Social Security Laws, and the Federal Employment Tax Laws.

Shortly after that time, the problem of the status of merchant seamen employed on vessels owned by or bareboat chartered to the War Shipping Administration was submitted to the Congress in connection with H. R. 133, 78th Congress. This bill as enacted (Public Law 17, 78th Congress, approved March 24, 1943) put all merchant seamen on the same basis as seamen in private employment with respect to: (1) the right to wages, maintenance and cure, in case of illness or

injury in the ship's service; (2) the right to the benefits of the Public Health Service, including Marine Hospitals; (3) old age and survivors' insurance under the Social Security Act; (4) the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances; (5) the right to action under the Jones Act for injury or death resulting from negligence of the employer; (6) the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act, except that claims with respect to Social Security benefits shall be prosecuted in accordance with the procedure provided in the Social Security Law; (7) the protection of war risk insurance at the employer's expense, in accordance with the decisions of the Maritime War Emergency Board, as required for all privately employed seamen. Similarly, they are entitled to war bonus payments under decisions of this Board.

Moreover, Public Law 17 excludes merchant seamen from the operation of the following statutes which ordinarily cover government employees: (1) Civil Service Retirement Act, because as private employees they are covered by the Social Security Act; (2) United States Employees Compensation Act, because as private employees they are covered by the Jones Act, and have the protection of war risk insurance under decisions of the Maritime War Emergency Board; (3) Public Law 490, because the pay and allowances provided in that Act for missing and interned employees of the United States are furnished under the requirements of the Maritime

War Emergency Board; and (4) Public Law 784, providing war casualty compensation and detention payments for contract employees serving outside the United States.

In reporting H. R. 133 to the House of Representatives, the Committee on Merchant Marine and Fisheries said:

> The basic scope and philosophy of the measure is to preserve private rights of seamen while utilizing the merchant marine to the utmost for public wartime benefit.

At the time the War Shipping Administration requisitioned the American Merchant Marine, the great majority of trained and qualified seagoing personnel were members of the various established maritime labor organizations; and most operators were parties to collective bargaining agreements with them. In May, 1942, the War Shipping Administrator signed documents known as the Statements of Policy with all of the principal maritime labor organizations. Under the Statements of Policy the War Shipping Administration agreed that, as steamship operators were appointed as agents of the War Shipping Administration, their customary and usual practices of securing and dealing with seagoing personnel would not be disturbed. It was the purpose and understanding of the Statements of Policy that collective bargaining and collective bargaining procedures and practices, which were established in the industry and which remained established on time chartered vessels after requisition, should be extended and maintained on vessels bareboat chartered to or owned by the War Shipping Administration. The foregoing development is

summarized in the report of the Committee on Merchant Marine and Fisheries to the House of Representatives with respect to H. R. 133, as follows:

> Shortly after the appointment of the Administrator, he adopted a statement of labor policy in which he specifically provided that "the provisions of the existing collective bargaining agreements be continued and observed unless changed by mutual agreement." Accordingly, the seamen employed by the War Shipping Administration through its general agents are entitled to all of the contractual rights of seamen on commercial vessels, including overtime compensation, right to settle disputes through arbitration, special bonuses and penalty provisions, and so forth. By this means, there has been preserved existing labor structures which have been built up in a process of experimentation and evolution, and there has been maintained and utilized for the war effort the experience of responsible organizations and leadership. Although employees of the Government, these seamen are paid by the general agents directly in the same manner as payment is made in commercial operations, the funds for such payments having been lodged in bank accounts maintained by the general agents out of revenues received from the operation or from advances made by the Administrator.

The Committee likewise considered the possibility of amendment of the National Labor Relations Act and in the same report stated:

> Suggestions have been made that the National Labor Relations Act be made appli-

cable to seamen, notwithstanding the fact that seamen employed by the Government would not be entitled to benefits under that Act. The Committee understands that it is the intention of the Administrator of the War Shipping Administration to avail himself of the facilities of the National Labor Relations Board for the purpose of aiding in the maintenance of collective bargaining processes and adjusting problems in such connection when consistent with the prime objective of a vigorous and successful prosecution of the war. Under the Executive Order creating the War Shipping Administration, the Administrator has full authority to avail himself of such services, and in view of the expressed attitude in this connection, it seems unnecessary to consider further suggestions for making the National Labor Relations Act specifically applicable to seamen by Statute.

The Administrator's proposed solution to this problem would appear to assure seamen the substantial benefits of the National Labor Relations Act without infringing upon the well-established principles that the United States as an employer is not subject to the National Labor Relations Act. The Administrator could avoid subjecting disputes or other problems to the National Labor Relations Board in cases where this might interfere with the effective prosecution of his duties and functions. Accordingly, this solution of the problem seems to make legislative action unnecessary.

In view of the foregoing considerations, there appears to be no reason, from the War Shipping Administration standpoint, why the Case at hand should not be disposed of in accordance with the

arrangement established by our exchanges of correspondence, and it is not the desire of the War Shipping Administration that there be any departure from that arrangement.

Sincerely yours,

(Sgd.) E. S. Land,
E. S. LAND,
Administrator.

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APR 22 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 625.

October Term, 1945.

CECIL I. HUST,

Petitioner,

v.

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION AND BRIEF OF AMICUS CURIAE.

ABRAHAM E. FREEDMAN,
Counsel for National Organization Marine Engineers Beneficial Association, National Organization Masters, Mates and Pilots.

RICHARD M. CANTOR,
Counsel for Seafarers International Union of America, Sailors Union of the Pacific, Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association.

SAMUEL H. LANDY,
WILFRED R. LORRY,
MILTON M. BOROWSKY,
CHARLES LAKATOS,
Of Counsel.

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IN THE

Supreme Court of the United States.

October Term, 1945. No. 625.

CECIL I. HUST,

Petitioner,

v.

MOORE-McCORMACK LINES, INC.,

Respondent.

MOTION FOR LEAVE TO SUBMIT BRIEF.

MAY IT PLEASE THE COURT:

In behalf of National Organization Marine Engineers Beneficial Association, National Organization Masters, Mates and Pilots, Seafarers International Union of America, Sailors Union of the Pacific, Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association, it is respectfully requested that the Court grant permission to file and receive the annexed Brief in connection with the instant cause.

Since the outbreak of the War, practically all of the merchant vessels have been operated for the United States by private operators. The within matter involves the liability of those private operators to the members of the crew. The unions, in whose behalf this Motion is made, represent the licensed personnel of the American Merchant Marine, and a very substantial number of the unlicensed personnel. The members of these groups will be vitally affected by the outcome of the decision of this Honorable Court in the instant case. The decision will determine whether all of these personnel will be able to institute any litigation against the private operators with whom they

have been doing business or whether their remedies will be limited solely to suits against the United States.

Upon these considerations, special leave is respectfully sought to present the annexed Brief in support of the Petitioner's contentions on the Writ of Certiorari.

In advance of the preparation of this Motion, counsel for the Petitioner, Mr. Edwin D. Hicks, expressed his consent, and counsel for the Respondent, Mr. Erskine Wood, declined to consent to the filing of the Brief as Amicus Curiae.

ABRAHAM E. FREEDMAN.

PETITION AND BRIEF OF AMICUS CURIAE.

Preliminary Statement.

The instant case presents a problem which is common to every other litigation arising out of the operation of American flag vessels since the outbreak of the war. With the commencement of hostilities, the United States, through the War Shipping Administration requisitioned all available merchant vessels in aid of the war effort. The requisitioning was, for all practical purposes a bookkeeping entry, because the vessels were not actually taken away from the private operators. On the contrary the operators continued to operate the vessels on what might be described as a cost plus basis. After the requisition the vessels were then "assigned" to the private operators under the terms of a so-called "General Agency Agreement" (Fed. Reg. V. 7, P. 7561). Other vessels built by the Maritime Commission were similarly assigned and delivered to the private operators. Under the terms of the GAA agreement the private operator was characterized as the "agent" and not an independent contractor, and the master was to be considered an employee of the United States; the crew to be engaged by the master. Because of these facts, the Supreme Court of Oregon in the instant case, held that the private operator was not liable for torts arising out of the operation of the vessel.

The position of the Amicus Curiae is that the status and liability of the private operator must be determined in the light of the services actually required or performed and not by the technical nomenclature of the agreement, and in that view the operator or "agent" was fully liable as an owner "pro hac vice."

ARGUMENT.

Under the Terms of the General Agency Agreement the Private Operator Was Vested With Substantial Control Over the Operation of the Vessel and Therefore Subject to the Liabilities of an Owner "Pro Hac Vice."

The problem at hand has been passed upon by several of the various District Courts and the decisions follow two diametrically opposed views. One of these views holds the operator liable on the ground that under the terms of the General Agency Agreement itself the private operator was required in fact to exercise the functions of an owner pro hac vice. This view is expressed in the line of decisions following *McCormack v. Moore-McCormack Lines;* 54 F. Supp. 399. The other view which is illustrated by those cases following *Murray v. American Export Lines,* 53 F. Supp. 861, holds that the private operator was a mere agent of the War Shipping Administration without any control over the operation of the vessel and consequently not liable for torts of the vessel or her personnel. We respectfully suggest that this latter view is completely repudiated by the General Agency Agreement itself and by the law as it applies to an operator under that agreement.

To begin with, the decisions representing the opposing view approach the problem from an entirely erroneous standpoint. They begin with the premise that the seamen must prove a relationship of employer and employee with the so called General Agent before there can be any recovery and, since the crew must be construed to be employees of the United States no liability can attach to the private operator. None of these contentions can stand analysis.

From the earliest times neither the shipowner nor the operator employed the crew. It has always been the master of the ship who engaged the crew and signed an agreement between himself and the crew. In point of fact he is so required to do by law and the statute also provides the form of agreement, or shipping articles as they are called,

which he must sign with the crew. R. S. 4612, December 21, 1898, c. 28 secs. 23, 26, 30 Stat. 762, 764 March 4, 1915, c. 153, sec. 10, 38 Stat. 1168 (46 U. S. C. A. 713). The Act, in specifying the form of the articles of agreement states:

> "It is agreed *between the master and seamen* or mariners of the ———, of which ——— ——— is at present master . . . now bound from the port of ——— . . . "

The Act further requires the signature of the master and crew. Thus, the contract of employment has always been clearly one between the master of the vessel and the crew. The shipping articles which were entered into in the instant case were in strict accordance with the Act. Respondent places much stress on the fact that the shipping agreement is between the master and the crew and not between the private operator and the crew. It is urged from this premise that there could not be any employment relationship between the crew and the operator. Aside of the fact that the premise is wrong because the contract was prescribed by law, the conclusion drawn by the Respondent is wholly without basis in the light of the Maritime history and general maritime law.

The operation of a vessel is completely different from that of any shore facility. When a vessel puts to sea it leaves behind the protection and security afforded within the sheltered confines of the land. It becomes subject not only to the elements but also to other outside influences which may endanger the crew, vessel and cargo. It is therefore absolutely essential that the master be vested with complete power and responsibility for the duration of the voyage. The fact that the Government seeks to hold the master strictly accountable for the full operations of the vessel, including the safety of the crew, cargo and vessel, adds nothing to the responsibility imposed upon him by custom and law. The master has always had full control of every department on the ship with full discretion.

U. S. v. Farham, 25 Fed. Cas. 15,071; *Denholm Shipping Co. v. Hedger*, 34 F. (2d) 572; *The Oregon*, 158 U. S. 178, 39 L. Ed. 943. However, during the life of the charter party, the master, so far as third persons are concerned, is considered the agent of the operator and not the owner. *Bacarrat v. Mahoney*, 1933 AMC 1652. The contention of Respondent that the master is given the full authority over the vessel's operations under the terms of the general agency agreement is therefore without significance. The question then presents itself, what are the relationships between the owner or operator and the vessel, and their respective liabilities?

Under the general maritime law before the Jones Act the *vessel* and her *owner* were liable to the crew for damages due to unseaworthiness or the failure to supply and keep in order proper appliances. *The Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483. The Jones Act (46 U. S. C. A. 688, 1920) incorporated into the maritime law the Federal Employers Liability Acts. Respondent contends that the suit in the instant case is brought solely under the Jones Act and must be brought against the employer. Aside of the fact that such a relationship is presented in all these cases, it must be noted that such a suit by a seaman is not brought solely under the Jones Act but rather under the maritime law as modified by the Jones Act and these rights are cumulative and not alternative. *Panama R. R. v. Johnson*, 264 U. S. 375, 44 S. Ct. 391; *Brown v. C. D. Mallory*, 122 F. (2d) 98. Thus, the seaman had available to him all the substantive rights in the same action *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 71 L. Ed. 1069. All these rights he could assert against the owner of the vessel.

The term "owner" when used in connection with a vessel includes more than the nominal owner and extends to all those who exercise substantial control over the vessel. The question arises generally where the vessel is under some form of charter arrangement. Where the charter merely provides for the use of the vessel with the pos-

session and management retained by the owner, such an arrangement is known as a "time" charter and the "time" charterer incurs none of the liabilities of an owner or operator. Where, however, the charter goes further and provides that the possession and management shall be transferred to the charterer, then the charterer becomes the owner "pro hac vice", for the duration of the charter period, and is fully subject to the duties and responsibilities of ownership. *U. S. v. Shea*, 152 U. S. 178, 38 L. Ed. 403; *Leary v. U. S.*, 14 Wall. 607, 20 L. Ed. 756; *Reed v. U. S.* 11 Wall. 591, 20 L. Ed. 220; *Clyde Commercial Steamships v. U. S. Shipping Co.*, 152 Fed. 516; *The Del Norte*, 111 Fed. 542; *Richardson v. Winsor*, 20 Fed. Cas. No. 11,795; *Webb v. Pierce*, 29 Fed. Cas. No. 17,320. It is appropriate at this point to examine the General Agency Agreement in order to determine what measure of control the "General Agent" exercised and its relationship to the vessel.

There are two outstanding and most important elements in determining whether an operator is an owner "pro hac vice"; first is the management and second the possession of the vessel. Where these elements are present it is immaterial that the general owner reserves to himself under the contract a substantial measure of control or management. *U. S. v. Shea*, supra; *Hill v. Leeds*, 149 Fed. 878. An analysis of the agency agreement shows beyond doubt that the private operator although labelled as a "General Agent" is in actual fact the real managing operator.

The very first article of the General Agency Agreement provides that the General Agent is appointed:

> "to manage and conduct the business of the vessels assigned to it by the United States from time to time".

Thus, at the very outset of the Agreement, in express and unambiguous terms it shows that the private operator is vested with the management of the vessels "assigned" to it. The term "assigned" clearly implies a transfer of possession. In fact, the second article, after repeating the

duties of management vested in the operator, states in connection with the transfer and possession:

> "of such vessels as have been or may be by the United States assigned to and *accepted* by the General Agent for that purpose".

The transfer of possession to the private operator is further evidenced by article 11 (a) which provides in connection with termination:

> "The United States shall have the right to terminate this agreement at any time as to any and all vessels assigned to the General Agent *and to assume control forthwith* of any and all said vessels upon fifteen (15) days written or telegraphic notice."

The inescapeable inference follows that the control of the vessel was presumed to have been and actually was in the private operator before that control could be returned to the United States. Article 12 is further evidence that possession under the agreement was in the private operator and provides, that custody shall be transferred from the operator to the United States upon termination, as follows:

> "In case of termination of this agreement, whether upon expiration or otherwise, all vessels and other property of whatsoever kind *then in custody of the general agent pursuant to this agreement, shall be immediately turned over to the United States.*"

It would be difficult to draft an agreement which would show more clearly not only that the operator was required to manage the vessels, but that a transfer of the vessels was effected from the United States to the private operators and the actual custody of the vessels was in the private operator during the life of the contract.

Those cases which have exonerated the private operators have completely overlooked the principles above set forth. They rely exclusively on the fact that the operator

is termed an "agent" and that under article 3 (d) of the agreement the master is stated to be an agent and employee of the United States with full control over the vessel, and the operator shall "procure" the crew for engagement by the master. It is submitted that if those courts had considered the entire agreement in the light of the applicable legal principles they would have reached the exact opposite conclusion.

In *United States v. Shea*, 152 U. S. 178, 38 L. Ed. 403, and in *Hill v. Leeds*, 149 Fed. 878, the Courts held that where the *management* and *possession* of the vessel are given up to the shipping company, it is immaterial that the general owner, by the terms of the contract is required to provide the crew. The agreements in those cases go further than the one at bar because the United States, the owner here, had nothing to do with providing the crew. On the contrary it was the operator who actually "procures" the master, and "procures" the crew for engagement by the master. We have already shown that this was not only in accordance with established custom but was in accordance with the Act of Congress which requires the master to actually engage the crew. Moreover, the master, so far as third persons are concerned must be considered an agent of the operator and not the owner. *Bacarrat v. Mahoney*, supra. Taken in the light most favorable to Respondent, article 3 (d) which is so strongly relied on, cannot in any degree change the status of the private operator. It may be noted in passing that this same article when further examined far from sustains the sweeping inferences that have been attached. The master is actually engaged by the private operator, "subject to the approval of the United States." Whatever his relationship to the United States, he must deal with and make accountings only to the private operator. The agreement leaves the operator free to remove the master and appoint another, subject only to approval of the United States. It is significant also that the operator shall procure the remaining officers and crew for

engagement by the master in accordance with the Act of Congress but the agreement does not provide that all the crew other than the master should be considered as employees of the United States. Whatever their relationship to the United States might be, their relationship to the operator must be considered as though the United States were not even in the picture. They were employed as the contract expressly states:

> ". . . such officers and men shall be procured by the general agent through the usual channels and in accordance with customary practices of commercial operators upon the terms and conditions prevailing. . . ."

Even if the captain and the entire crew had been directly engaged and appointed by the owner, it would not have lessened the managing agent's liabilities. *The Del Norte,* supra; *American Steel Barge Co. v. Cargo of Coal,* 107 Fed. 964; *The Charlotte,* supra. In the instant case, however, the owner played no part in engaging or procuring the crew and the crew's status was the same as it always had been, at least with respect to the private operator.

It is interesting to note that both the private operator and the United States anticipated that the private operator would be liable as an employer for social security taxes and accordingly made provision for reimbursement as follows: (Article 7)

> ". . . for the amount of any Social Security taxes which the general agent is or may be required to pay on behalf of the officers and crew of said vessels as agents or otherwise."

Under the GAA agreement the operator pays the wages although later reimbursed by the United States. It may be stated that even if the owner paid the wages directly it would not affect the status of the managing agent. *The Charlotte,* 285 Fed. 84, aff. 299 Fed. 595, cert. den. 266 U. S. 604; *Hills v. Leeds,* supra.

The War Shipping Administration under the agreement assumed responsibility for fire and marine risks. This fact likewise does not lessen the responsibilities of the managing operator. *Hills v. Leeds*, supra; *Middlebrook v. U. S.*, 67 Ct. Cl. 294, cert. den. 280 U. S. 564. The same is true where the owner is required to insure the vessel, *Colcar S. S. Co. v. Tweedie Trading Co.*, 146 Fed. 563; or to pay insurance on it, "*The Barnstable*", 181 U. S. 464; or even where the owner is required to provision and equip the vessel during the voyage, *In Re Certain Logs of Mahogany*, 5 Fed. Cas. No. 2,559; or where disbursements beyond a fixd sum cannot be made without the owner, *The Nat. E. Sutton*, 42 F. (2d) 229; or that the owner shall have the right to cancel (as in the instant case) and terminate the charter party, of taking possession of the vessel at any time, wherever it might be found, *Rich v. Jordan*, 164 Mass. 127. A demise charterer may be deemed an owner and limit his liability under R. S. 4286-46 U. S. C. A. 186.

It may fairly be stated therefore that under the general law, where one is given the possession and management of a vessel, he becomes vested, particularly with respect to third persons, with all the rights and liabilities of an operating owner. Nor can this status be altered by placing a different label on the parties. The general agency agreement not only expressly states that the private operators shall manage and conduct the business of the vessel but it goes on to specify the duties required of the operator which prove that the operator was the manager in fact.

Article 3 (a) provides that the operator shall "maintain the vessels in such trade or service as the United States may direct . . .";

Article 3 (b) the operator shall collect all monies due from the operation of the vessel;

Article 3 (c) the operator must "equip, victual, supply and maintain the vessels";

Article 4 (a) the agent shall "(1) keep its books, records and accounts relating to the *management, operation,*

conduct of the business of and *maintenance* of the vessels; (2) file balance sheets, *profit and loss statements*, and such other *statements of operation*, special reports, memoranda of any facts and transactions."

Article 7 provides for reimbursement for all moneys paid by operator for crew expenditures and for maintenance and cure and damages for personal injury and death. Clearly the parties to the agreement anticipated that the private operators would be personally liable for these elements.

Article 14 required the general agent to look after and keep in repair the vessel and all its equipment.

Article 16 (a) indemnifies the operator against all losses including damages and maintenance and cure, arising from the operation or use of the vessel. Here again is evidence that the parties recognized a personal liability on the part of the operator.

In short, the private operator performed all services necessary in connection with the operation of a vessel just as it did before the United States entered the picture. The entry of the government into the picture did not take away any of the functions of the private operator but merely required the operator to make accounting of its operations. Nor could the status of the operator be changed by designating him as the "general agent", rather than the operator. Under the circumstances, the general agent, or the operator, however he may be termed must be considered as an owner "pro hac vice". The overwhelming weight of authority precludes any other conclusion.

A Private Operator Cannot Insulate Himself From Liability by Setting Himself Up as a General Agent.

The general agency agreement involved in the instant case does not differ very materially from the agreements under which shipping companies operated government vessels prior to the war. The litigations arising in connec-

tion with those agreements hold the "agents" personally liable as operating owners.

In *Odgaard v. Cosmopolitan Shipping Co.*, 1939 A. M. C. 1038, the suit was by a seaman for personal injuries against the private operator. The vessel was owned by the United States and operated by the defendant as agent for the United States. The defendant moved to dismiss for lack of jurisdiction. In denying the motion, the Court said:

> "This is an action brought by a seaman to recover for personal injuries pursuant to the Jones Act, 46 Mason's U. S. C., sec. 688. The defendant moves to dismiss the complaint for lack of jurisdiction upon showing the following facts:
>
> "The vessel upon which the plaintiff was injured, the S. S. West Cusseta, was at the time involved owned by the Government of the United States. It was operated by the defendant, Cosmopolitan Shipping Company, Inc., as agent for the United States."
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> • • •
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> "The defendant is sued as the agent responsible for the injury suffered by the plaintiff. *While the plaintiff might have elected to include the United States as a defendant, he did not do so, and there does not appear to be any way in which the defendant sued could make its liability that of the Government.* Under those circumstances the case differs from no other *under the Jones Act*, and that being so the plaintiff may sue in the State Court if he so desires. Panama R. Co. v. Vasquez, 271 U. S. 557, 1926 A. M. C. 984; Vasquez v. Panama R. Co., 239 N. Y. 590, 147 N. E. 208.
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> "Motion denied."

The most recent decision from the Supreme Court of the United States involving the question at bar was rendered in the case of *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575, 87 L. Ed. 471. The agency agreement involved in

that case was very similar to the one involved at bar. It was contended there that the plaintiff's remedies were controlled only under the Suits in Admiralty Act. The Court held that the right to sue the United States did not curtail the seamen's existing remedies against a private operator and the general agent was held responsible for a tort arising out of the operation of the vessel. Said the Court:

> "There is ample support for the holding in the Johnson case that Sec. 2 of the Suits in Admiralty Act was intended to provide the only available remedy against the United States or its wholly owned corporations for enforcement of maritime causes of action covered by the Act. *But there is not the slightest intimation or suggestion in the history of that Act that it was designed to abolish all remedies which might exist against a private company for torts committed during its operation of government vessels under agency agreements.*"
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> * * *
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> "The wording of that section makes clear that the right to arrest or seize the vessel was taken away whether the vessel was operated by the United States or its wholly owned corporation or for either of them by a private company. To that extent the Act affects remedies which would otherwise exist on maritime causes of action arising out of operation of government vessels by private companies for the United States or its wholly owned corporations. *Yet there is no indication whatsoever that it went further and took away any personal remedy which a tort claimant might have against such a private operator.* While Sec. 1 abolishes the right to arrest or seize the vessel, Sec. 2 provides that 'a libel in personam may be brought against the United States or against such corporation' in cases where 'if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained.' *Section 2, however, does not mention private operators.*

Nor do the committee Reports advert to private operators, except as they may be affected by Sec. 1."

"The liability of an agent for his own negligence has long been embedded in the law. Quinn v. Southgate Nelson Corp. (CCA 2d) 124 F. (2d) 190, is a recent application of that principle to a situation very close to the present one. But the principle is an ancient one and applies even to certain acts of public officers or public instrumentalities. As stated in Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corporation, 258 U. S. 549, 567, 66 L. Ed. 762, 768, 42 S. Ct. 386, 48 Am. Bankr. Rep. 249: 'An instrumentality of government he might be and for the greatest ends, *but the agent, because he is agent, does not cease to be answerable for his acts.*' In that case the Fleet Corporation was held to be amenable to suit. And that policy has been followed. For when it comes to the utilization of corporate facilities in the broadening phases of federal activities in the commercial or business field, immunity from suit is not favored.

"Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 83 L. Ed. 784, 59 S. Ct. 516; Federal Housing Administration v. Burr, 309 U. S. 242, 84 L. Ed. 724, 60 S. Ct. 488. Congress adopted that policy when it made corporations wholly owned by the United States suable on maritime causes of action under Sec. 2 of the Suits in Admiralty Act. That it had the power to grant or withhold immunity from suit on behalf of governmental corporations is plain. Federal Land Bank v. Priddy, 295 U. S. 229, 79 L. Ed. 1408, 55 S. Ct. 705; Reconstruction Finance Corp. v. Monihan Corp., 312 U. S. 81, 85 L. Ed. 595, 61 S. Ct. 485. *We may also assume that it would have the power to grant immunity to private operators of government vessels for their torts. But such a basic change in one of the fundamentals of the law of agency should hardly be left to conjecture.* The withdrawal of the right to sue the

agent for his torts would result at times in a substantial dilution of the rights of claimants. Assuming that the ordinary rules of agency apply in determining whether the United States or the Maritime Commission is responsible under Sec. 2 of the Act for torts of private operators such as respondent, there would be instances where unless the private operator was liable no one would be. The principal is not liable for every negligent act of his agent. Furthermore, if all suits to enforce maritime causes of action must be brought in such cases under Sec. 2 of the Act the short statute of limitations of two years contained in Sec. 5, 46 U. S. C. A. Sec. 745, is applicable. United States Shipping Bd. Emergency Fleet Corp. v. Rosenberg Bros. & Co., 276 U. S. 202, 702 L. Ed. 531, 48 S. Ct. 256, supra."

"We can only conclude that if Congress had intended to make such an inroad on the rights of claimants it would have said so in unambiguous terms."

It was also contended in the Brady case that any judgment rendered against the defendant would have to be paid by the United States and in effect it would, therefore, be a judgment against the United States. The agreement at bar contains the same provision. It was, therefore, urged for that reason also that the suit should only be brought against the United States under the Suits in Admiralty Act. This contention was also rejected by the Supreme Court as follows:

"It is contended, however, that if the judgment against respondent stands, the United States ultimately will have to pay it by reason of provisions of the contract between respondent and the Commission. It is, therefore, urged that the United States is the real party in interest. We do not stop to interpret the contract. Even if we assume, without deciding, that the Commission has contracted to reimburse the respond-

ent for such expenditures, it does not affect the result in this case. *The right of the private operator to recover over from the United States would be a matter of favor not of right in many cases.* For apart from any express contract the agent's right of exoneration or indemnity has not been thought to extend to situations where his liability was based on his own fault. 4 Williston, Contracts, 1936 ed. Sec. 1026. Hence we cannot conclude that in all cases where a private operator of a government vessel under an agency agreement is sued the United States would as a matter of law ultimately be liable to pay in absence of an express provision for exoneration. It is hard to believe that Congress had any such notion when it passed the Suits in Admiralty Act. To attribute that idea to it would be to give the Act a construction which would in practical effect encourage the assumption by the United States of the obligations of private persons."

Moreover, the Court recognized that the rights as between the plaintiff and the defendant here could not be altered by any contract between the private operator and any third party. Said the Court:

> "*Moreover, if petitioner had a cause of action against respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission.* Immunity from suit on a cause of action which the law creates cannot be so readily obtained. Cf. Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 143, 35 L. Ed. 116, 118, 11 S. Ct. 512. *The rights of principal and agent inter se are not the measure of the rights of third persons against either of them for their torts.*"
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> • • •
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> "The question is not whether the Commission had authority to delegate to respondent responsibilities for managing and operating the vessel as its agent. *It is*

whether respondent can escape liability for a negligent exercise of that delegated power if we assume that by contract it will be exonerated or indemnified for any damages it must pay. As stated in Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp., supra (258 U. S., pp. 566, 567, 66 L. Ed. 768, 42 S. Ct. 386, 48 Am. Bankr. Rep. 249), 'the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him.' Furthermore, if the United States were to become the real party in interest by reason of a contract for exoneration or indemnity a basic alteration in that concept (Minnesota v. Hitchcock, 185 U. S. 373, 387, 46 L. Ed. 954, 962, 22 S. Ct. 650) would be made not pursuant to a Congressional policy but by reason of concessions made by contracting officers of the government. Such a change would be detrimental to the interests of private claimants, as we have said, since it would subtract from the legal remedies which the law has afforded them. Beyond that it would make the existence of a right to exoneration or indemnity a jurisdictional fact. That could hardly help but complicate and delay the enforcement of rights based on these maritime torts. *At least in the absence of a clear Congressional policy to that end, we cannot go so far.*"

Another very recent decision on all fours with the case at bar is *Quinn v. Southgate Nelson Corporation*, 121 F. (2d) 190, cert. den., 314 U. S. 682. There the vessel was also owned by the United States, but was managed by the private operator as here. The damage was caused by the negligent navigation of the vessel and suit was brought against the private operator. The Court decided the same issues which are involved at bar. An excerpt from that opinion thoroughly repudiates the arguments of these defendants as follows:

"The District Court was amply justified in finding negligence in the operation of the Waukegan. *The only question deserving discussion is whether the negligence is attributable to appellant, the managing agent of the vessel.* Appellant contends that the judgment against it was erroneous because the United States or the Maritime Commission is liable to appellee; it cites an opinion to the effect that the United States is liable, by the Attorney General, in 1925, construing a form of contract used by the United States Shipping Board, which appellant asserts to be similar to that involved here. But, assuming that there is such a similarity and that either the United States or the Maritime Commission is liable to appellee, *it does not follow that appellant is exculpated.* That a principal is liable for a wrong does *not necessarily immunize his agent.* Blumenthal & Co. v. United States, 2 Cir., 1929, 30 F. 2nd 247, 248, 249; Sloan Shipyards v. United States Fleet Corp., 1922, 258 U. S. 549, 567, 568, 42 S. Ct. 386, 66 L. Ed. 762. The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow. It is irrelevant here, whether at common law or by statute, appellee has a cause of action against the United States or the Commission, or whether appellant may be liable to the United States or the Commission for whatever amounts either of them may be obligated to pay appellee. Common sense and the precedents make appellant liable on the facts of this case. *It had a most substantial measure of control over the operation of the vessel; it was paid to 'manage, operate and conduct the business of the line'. The reserved powers of the owner could not possibly have been so burdensome as to deprive appellant of de facto control, and there is no showing that in fact the owner did substitute itself as manager, either generally or at the time of this accident. Even if the Maritime Commission*

selected the officers, as appellant contends, appellant was not ousted of control. We think our opinion in United States Shipping Board Emergency Fleet Corp. v. Greenwald, 16 F. 2d 948, which held a managing agent with similar powers liable for the death of a seaman, is applicable here, although in that case the managing agent had an interest in the profits. That the compensation appellant received from the Maritime Commission was relatively small is of no importance, *for that was a matter of contract between it and the Commission, and cannot affect appellant's liability to third persons.*

"Judgment affirmed."

Another similar situation arose in the case of *U. S. Shipping Board E. P. Corp. et al. v. Greenwald,* 16 F. (2d) 948. There it was shown that the United States owned and the private operator managed the vessel. A member of the crew became ill from the food on board and died. Suit was brought against the private operator who pleaded that he was only an agent for the United States. The Court, in affirming the Court below, said:

"Nor was error committed in applying the statute of the District of Columbia as against plaintiff in error Bull & Co. It operated the vessel as managing agent for the Shipping Board. The shipping board took over complete control from the United States to manage and operate them for its own independent account. Under the contract between the Shipping Board and Bull & Co., the former retained a check on officers and crew personnel. Bull & Co. managed and operated the vessel on a 'cost plus' plan and received a percentage of the profits. *It is conceded in the record that the decedent was employed by the Shipping Board and under those circumstances Bull & Co. are deemed owners pro hac vice with all liabilities ordinarily attaching against a true owner.* Sloan Shipyards v. U. S. Ship-

ping Board, etc., 238 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; Everett v. United States (D. C.) 277 F. 256; Stewart v. U. S. Shipping Board, etc. (D. C.) 7 F. (2d) 676."

Among the first decisions rendered in connection with the general agency agreement involved at bar was that of *McCormack v. Moore-McCormack Lines et al.*, 54 F. Supp. 399. In outlining the issues the Court said:

"The motions for summary judgments in all of the cases are predicated on the position that the defendant did not own or operate the vessels, at the time of the alleged injuries to the various persons, but that it was merely the vessels' agent; that the plaintiffs' cause of action, if any, is against the United States, which was the owner of the vessels."

The Court held that the principle set forth in the *Brady* case was directly applicable and denied the motions to dismiss as follows:

"It seems to me the Kennedy, Broadbent and McCormick cases call for very little discussion, since they are ruled by the case of Brady v. Roosevelt Steamship Company, 317 U. S. 575, 63 S. Ct. 425, 87 L. Ed. 471. Here it was definitely held that an agent of a vessel operating it on behalf of the United States, could be held liable for personal injuries if such injuries were caused or contributed by, any fault or negligence of the agent—that the agent because he is agent, does not cease to be answerable for his acts. Accordingly, if we assume the best phase of the defendants' contention that the general agency agreement of March 22, 1942, was retroactive and binding on these plaintiffs the same situation is presented as was presented in the Brady case, supra, and the mere fact that the government was to indemnify the defendant, and might ultimately be called upon to pay a judgment rendered against them is no reason, as the Court stated, to deny

the plaintiff's right to bring suit. The contention of the defendants, that the Brady case, supra, is limited only to instances where under the pleadings it could be established that an agent had notice of a dangerous condition, and was thereafter under a duty, not alone to its principal, but to all persons using the vessel, to remedy the condition before it caused harm, is without merit, as the court deals at length with the liability of a private operator for its torts as agent, and concludes that if the Congress had intended to make any inroads on the rights of claimants in instances such as this, it would have so stated in unambiguous terms."

In *Moser v. Standard Oil Co.*, 60 F. Supp. 6, the suit was by a seaman against the private operator for the loss of personal effects. The defense was raised that the private operator was merely an agent and had no control over the vessel. In dismissing this contention on the authority of the *Brady* case the Court said:

> *"There is no merit to the respondent's further contention that because it was operating the ship as agent for the War Shipping Administration it is not liable for its failure to return libellant's belongings or to explain their loss.* See Brady v. Roosevelt S. S. Co., 317 U. S. 575, 87 L. Ed. 471."

In *Van Horn v. Waterman S. S. Co.*, 1944 A. M. C. 1081, it was contended that because the Government had requisitioned all vessels from the War Shipping Administration that private operators were no longer engaged in doing business in their own behalf. The Court denied this contention and held that the private operator was doing business and subject to the service of process.

Among one of the latest decisions on the point was rendered in the case of *Bruszewski v. Isthmian S. S. Co.*, 1946 A. M. C. 223. The identical defense was raised there which is involved in the instant case. In holding that the operator was personally responsible the Court said:

"The vessel was being operated under a so-called General Agency agreement between the United States acting through the Administrator of the War Shipping Administration and the Isthmian Steamship Company. The vessel was serviced by the defendant pursuant to the terms of the agreement, its purpose being to enable the government in its wartime activities to utilize the facilities and skill of experienced ship operators to whatever extent the exigencies of war might prescribe."

* * *

"In directing a verdict for the defendant at the close of all of the evidence, the court first resolved that the general agency agreement constituted the defendant an owner 'pro hac vice'. A studied consideration of the provisions of the general agency agreement leaving possession and management of the vessel to the defendant gave it such a substantial measure of control over its operation, that the powers reserved to the United States under it were not such as would deprive the defendant of de facto control of the vessel, which it seems to me, is the criterion to be adopted in making a determination. Brady v. Roosevelt S. S. Co., 317 U. S. 575, 1943 A. M. C. 1; McCormick v. Moore-McCormack Lines, Inc., 1943 A. M. C. 1422, 54 Fed. Supp. 399. While it is true that some factual differences obtain here which are not to be found in the Brady case, supra, in that the Master in the instant case was an agent and employee of the United States, and that it was the duty of the general agent to procure and make available to the master, the officers and crew who were to be subject only to the Master's orders, yet these differences it seems to me are not controlling. An over-all consideration shows that with the possession of the vessel in the defendant and its management and direction in it likewise, there was such a sufficient control and responsibility in the defendant as to give it the status of operator, and owner pro hac vice, and whatever dif-

ferences obtain in the instant agreement and those which were set out in the agreement under consideration in the Brady v. Roosevelt case, supra, they were not such as would divest the defendant company here of de facto control."

The operators' status was reviewed by the National Labor Relations Board in the matter of *Barge Carriers, Inc. v. Atlantic and Gulf District of the Seafarers International Union of N. A.*, Case No. 19-C-1382. After a thorough investigation directed at the relationship of the parties, the report states:

"From the foregoing findings, considered in the light of the entire record, the undersigned is convinced that the respondent is the employer of the employees here concerned, within the meaning of the Act. The acquisition by the W. S. A. of the vessels and the execution of the General Agency Agreement effected no change in the relationship between the respondent and the employees here concerned. Nor, despite the control exercised by the W. S. A. over the sailings and cargo of the vessels, has there been any change in, or attempt by the W. S. A. to change the working conditions of the employees. Realistically, it is plain that the labor policies concerning these seamen are controlled entirely by the respondent, under only nominal supervision of the W. S. A. The creation of the W. S. A. and the vesting in it of control over the shipping of the United States was a temporary measure designed to utilize more effectively such shipping for the prosecution of the war. The control exercised by the W. S. A. over the respondent's operations has been concerned largely with voyages and cargo, and not with labor relations. In excepting the United States as an employer from the application of the Act, the Congress can not have intended the exception to apply to a situation in which, for all practical purposes, the essential elements

of the employer-employee relationship remain in the control of the private operator, under only nominal and temporary supervision of the W. S. A. In the *Cosmopolitan Shipping Company* case, in which the contractual relationship between the United States and the company there involved was substantially the same as that between the United States and the respondent, the Board said:

> 'It appears to us that the Government, in turning over the operation and management of its vessels to a private corporation under the existing Agreement, has avoided, rather than assumed, the responsibilities of an employer. It has established the American France Line as a commercial venture, operating in competition with other lines. In the conduct of the business of the line, the Company is in full charge, receiving compensation based on the results of its own efforts. The Company, under the nominal supervision of the Government, does the actual hiring of the employees and has the sole direction of their activities while engaged in their duties on board the vessels. Under these circumstances, we do not feel that the Government can be said to be the employer of the engineers on its vessels. Furthermore, we are satisfied that the exemption of the Government from the operation of the Act was not meant to apply in the case of a commercial venture of this nature. We find, therefore, that the Company, in hiring the licensed engineers employed on the vessels which it operates, is an employer under the provisions of the Act.'

The undersigned finds that the respondent is an employer of the employees aboard the vessels operated by the respondent, within the meaning of the Act."

Conclusion.

Those cases which are authority for the opposing views do not undertake any discussion concerning the effect of the management and possession of the vessels. We think this was fundamental error which prevented the Court from reaching a proper conclusion. That the general agents were completely vested with the management and possession of the vessels cannot be open to doubt. That these factors are the true criteria in the determination of the general agents' status is likewise settled in the law. It is, therefore, respectfully submitted that the Supreme Court of Oregon erred in exonerating the general agent and the judgment of that Court should be reversed.

Respectfully submitted,

ABRAHAM E. FREEDMAN.

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SUPREME COURT OF THE UNITED STATES.

No. 625.—October Term, 1945.

Cecil I. Hust, Petitioner,
vs.
Moore-McCormack Lines, Inc.

On Writ of Certiorari to the Supreme Court of the State of Oregon.

[June 10, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case arises by virtue of the fact that during most of the Second World War substantially our entire merchant marine became part of a single vast shipping pool, said to have been the largest in history,[1] operated and controlled by the United States through the War Shipping Administration.[2] So huge an enterprise necessarily comprehended many intricate and complex readjustments from normal, peacetime shipping arrangements. These were executed largely through broad powers conferred upon the Administration.[3]

Eventually almost every vessel not immediately belonging to naval and other armed forces came under the Administration's authority. Otherwise than by direct construction and ownership, this was accomplished by transfer from private shipping interests to the Administration, pursuant to requisition or other arrangement.

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[1] As of the date of Japanese surrender the War Shipping Administration operated or owned approximately 4300 merchant ships, as compared with the 1375 ships available for deep-sea service in the prewar American merchant marine. The number of men needed for the wartime merchant marine was approximately 220,000, as compared with the prewar requirement of 55,000 men. For further figures on the expansion of the merchant marine during the war, see Note (1946) 55 Yale L. J. 584, note 1 and authorities cited.

[2] On February 7, 1942, the President, acting by virtue of the authority vested in him "by the Constitution and Statutes of the United States, including the First War Powers Act, 1941" (50 U. S. C. App. § 601), established the War Shipping Administration. Exec. Order No. 9054, Feb. 7, 1942, 7 Fed. Reg. 837, as amended by Exec. Order No. 9244, Sept. 16, 1942, 7 Fed. Reg. 7327.

[3] The Executive Order provided that the Administrator of the War Shipping Administration should "control the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States. . . ." It also transferred to the War Shipping Administration "the functions, duties and powers conferred by law upon the United States Maritime Commission with respect to the operation, purchase, charter, in-

Inevitably the industry's transfer from private to public control was achieved to a very great extent by making use not only of private property but also of private shipping men, both in management and for labor.[4] This too was brought about in various ways, but chiefly two for presently pertinent purposes. One was by time-chartering of privately-owned vessels with crew, in which case the men remained the private employees of the vessel's owner. The other was by either bareboat-charter or outright ownership by the Administration. In such instances, as will appear, master and seamen became technically employees of the United States.[5]

The difference is important for the issues and the decision in this case. They concern the broad question whether seamen employed in the latter capacity, as members of the United States Merchant Marine,[6] lost during the period of such service prior to March 24, 1943,[7] some of the American seamen's ordinary and usual protections in respect to personal injury or death incurred

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surance, repair, maintenance, and requisition of vessels and facilities required for the operation thereof . . ." under various specified statutes and executive orders "and under any other provisions of law, including Executive Orders. . . ."

The parties have not questioned the authority of the War Shipping Administration. The following statutes and executive orders relate to the authority exercised. § 902(a), Merchant Marine Act of 1936, 46 U. S. C. § 1242(a); § 902(e), Merchant Marine Act of 1936, as amended, 46 U. S. C. § 1242(e); § 207, Merchant Marine Act of 1936, as amended, 46 U. S. C. § 1117; §§ 1 and 2, Joint Resolution of February 6, 1941, 55 Stat. 5; Public Law 247, 77th Cong., 55 Stat. 669, 681; 50 U. S. C. App. § 1274; Exec. Order No. 9001, Dec. 27, 1941, 6 Fed. Reg. 6787, as amended by Exec. Order No. 9296, Jan. 30, 1943, 8 Fed. Reg. 1429.

4 See H. Rep. No. 2572, 77th Cong., 2d Sess., 8: "The Administrator, in the conduct of his duties and functions, makes very extensive use of the private organizations including those engaged in merchant marine insurance and related activities, steamship operators, stevedore, and terminal facilities, freight forwarders, and freight brokers and agents. Special skill, knowledge, and experience are made available in this manner for use in the integrated war effort. This development confirms the wisdom of the congressional policy in the recent years of stimulating and assisting the development of such private merchant marine and insurance facilities at substantial Government cost. The policy has permitted a quick change-over from peacetime to wartime operations of the entire merchant marine without any substantial loss of efficiency or impairment of morale."

5 See H. Rep. No. 2572, 77th Cong., 2d Sess., 8-10.

6 The seamen employed on Government operated vessels were, of course, in civilian, as opposed to military or naval, service. Cf. Hearings before the Committee on the Merchant Marine and Fisheries on H. R. 7424, 77th Cong., 2d Sess., 5-6.

7 The effective date of the so-called Clarification Act, 50 U. S. C. App. § 1291, discussed at various points in this opinion. Relevant portions of the Act are set forth ~~in note 35 and~~ in the text herein at note 36 and in note 35.

in the course of employment, or retained those rights. Specifically, in this case the question is whether petitioner Hust retained the seaman's usual right to jury trial in a suit against the respondent, pursuant to the provisions of the Jones Act,[8] for personal injuries incurred in the course of his employment as a seaman on the S.S. Mark Hanna. This was a Government-owned Liberty ship operated under a so-called General Agent Service Agreement between respondent and the Administration.

The Mark Hanna had been torpedoed in the Atlantic Ocean on March 9, 1943. Early on the morning of the 17th, the day of Hust's injury, the vessel was being towed to port. He was ordered to go to the ship's locker in the forepeak of the second deck and bring out a mooring line to be used in towing. The electric bulb lighting the locker room had burned out and the room was dark. While crossing it to get the line, Hust fell through an unguarded hatch about twelve feet to the third deck. In landing he struck a steel manhole cover projecting some six inches above the deck, and incurred the injuries for which this suit was brought on September 24, 1943, in the Circuit Court for the County of Multnomah, State of Oregon.

The complaint alleged that Hust was respondent's employee, was injured through its negligence, and that the suit was brought pursuant to § 33 of the Merchant Marine Act of 1920. Trial before a jury brought a verdict and judgment for Hust.[9] On appeal to the Supreme Court of Oregon the judgment was reversed and an order was entered for the cause to be remanded, with directions to enter judgment for the respondent notwithstanding the verdict. The Supreme Court held that, as a matter of law, petitioner was an employee of the United States, not of respondent, and therefore he was not entitled to recover from it under the Jones Act for the injuries alleged and proved. — Ore. —, 158 P. 2d 275. The importance of the question for the administration of the Act in application to persons situated similarly to the petitioner caused us to grant certiorari in order to review this ruling. — U. S. —.

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[8] Section 33, Merchant Marine Act of 1920, 46 U. S. C. § 688.

[9] On special interrogatory the jury had found that Hust was respondent's employee on the date the injuries were incurred. The verdict was for $35,000, which the trial court indicated in its opinion was excessive in relation to the injuries incurred. But being of opinion that the question of liability should be settled by review, it declined to order remittitur and denied the motion for judgment *non obstante veredicto*, in effect reserving decision on the question of remittitur pending outcome of decision on appeal.

The Supreme Court of Oregon considered that the controlling question was whether Hust was respondent's employee when the injuries were incurred; and that "it must be assumed . . . that the case is governed by the rule of the common law" to determine this question and thus the outcome of the case. Accordingly it examined with great care the arrangements which had been made between respondent and the Government for operation of the Mark Hanna, with special reference to the provisions of the General Service Agreement[10] to which the Administration and respondent were parties. From this examination the court concluded that respondent was an agent of the Administration for only limited purposes, not including control, authority or principalship of the master and crew or responsibility for negligent occurrences taking place at sea and not attributable to the manner of discharging any duty of respondent while the vessel was in port.[11] Hence, applying the common-law "control" test,[12] the court came to its conclusion that Hust was not respondent's employee as that relation is contemplated in the Jones Act. The court also found that the so-called Clarification Act[13] in no way gave support to his view that he could recover from respondent under the Jones Act.[14]

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[10] Acting within its authority, *cf.* note 3, the Administration utilized these standard contracts for making arrangements with private steamship companies for the operation of many of these vessels. 46 C. F. R. (Cum. Supp.) § 306.44. They did not cover specific vessels. Under Article 1 of the agreement, the general agent agreed to "manage and conduct the business assigned to it by the United States from time to time."

In the instant case, the General Agent Service Agreement appears to have been given retroactive effect. The agreement states that it is "made as of October 19, 1941"; but that it was actually made as of that date is impossible, since the War Shipping Administration did not come into being until February 7, 1942. See note 1.

Some of the terms of the agreement are summarized in the text and notes 30, 40, 41.

[11] Cf. Brady v. Roosevelt S. S. Co., 317 U. S. 575. On the evidence of negligence presented here it was not shown that respondent had failed to perform any duty in outfitting the ship or otherwise in relation to the delinquencies alleged to have constituted causes of the injuries. These, so far as the record discloses, were attributable entirely to occurrences taking place after the ship had last put to sea.

[12] See National Labor Relations Board v. Hearst Publications, 322 U. S. 111, notes 27 and 19 and authorities cited.

[13] See note 7.

[14] Petitioner relies on the following cases as supporting his position: Gay v. Pope & Talbot, 47 N. Y. S. 2d 16; McCormick v. Moore-McCormack Lines, 54 F. Supp. 399; Moss v. Alaska Packers Ass'n, 1945 A. M. C. 493; Bast v. American-Hawaiian S. S. Co., 1945 A. M. C. 503; Schaller v. Matson Navigation Co., 43 N. Y. S. 2d 16.

It is around these questions and the effect for determining them of various authorities, particularly *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, that the controversy has revolved in the state courts and here. In connection with the bearing of the Clarification Act, it is of some importance to note that Hust's injuries were sustained only a few days before that Act became effective on March 24, 1943, and that it contained features relating to injuries like Hust's incurred between that date and October 1, 1941, retroactive in character.[15] It is, in part, concerning those features that argument has been most intense.

I.

At the outset it is important to state just what the decision may mean in consequences for injured seamen and their dependents as well as for the Government.

The Jones Act was the culmination of a long struggle by seamen to secure more adequate relief in case of injury or death, incurred in the course of employment, than had been afforded by preexisting law.[16] We do not stop to review that history. But the history of the Jones Act since its enactment has been distinctive in that, at all subsequent times, seamen have opposed substituting for its provisions other forms of relief which have been tendered as being more in accord with modern trends of legislation for these matters.[17] Wisely or unwisely, they have steadfastly preferred the traditional remedy of jury trial for negligence to workmen's compensation based on liability without fault. By 1942, when the Government took over the merchant marine, that

Respondent relies upon Alciere v. Cosmopolitan Shipping Co., 1945 A. M. C. 906; Pedersen v. Stockard S. S. Corp., 1945 A. M. C. 23; Neilsen v. American President Lines, 1944 A. M. C. 1169; Steele v. American South African Line, 62 F. Supp. 636; Baker v. Moore-McCormack Lines, 57 F. Supp. 207; Conlon v. Hammond Shipping Co., 55 F. Supp. 655; Williams v. American Foreign S. S. Corp., 1946 A. M. C. 98; Ferris v. American South African Line, 1945 A. M. C. 1296; Walsh's Case, 1945 A. M. C. 747; Murray v. American Export Lines, 53 F. Supp. 861; Fox v. Alcoa S. S. Co., 143 F. 2d 667. See also Note (1946) 55 Yale L. J. 584.

[15] See text *infra* at note 36.

[16] See Warner v. Goltra, 293 U. S. 155; Gerradin v. United Fruit Co., 140 F. 2d 927.

[17] See Warner v. Goltra, *supra*, at 159-160 and the cited legislative history. In the hearings on the Clarification Act the seamen again opposed being brought within a compensation act. See statement of the National Maritime Union, Hearings before the Committee on the Merchant Marine and Fisheries on H. R. 7424, 77th Cong., 2d Sess., 30-31.

remedy had become a thoroughly established incident of the seaman's contract of employment, as much so as the historic relief afforded by the general maritime law for maintenance and cure or maritime tort.[18] It was one which attached to every seaman's contract.

Moreover, by § 1 of the Suits in Admiralty Act, like the Jones Act enacted in 1920, (41 Stat. 525, 46 U. S. C. §§ 741), arrest and seizure under judicial process were forbidden of vessels owned by the United States or a governmental corporation "or operated by or for the United States or such corporation"; and by § 2, in place of that right of seizure, "a libel in personam may be brought against the United States or against such [governmental] corporations" in cases where "if such vessel were privately owned or operated . . . a proceeding in admiralty could be maintained."

By the decision in *Johnson* v. *Fleet Corporation*, 280 U. S. 320, it was held that the remedies given by the Suits in Admiralty Act "are exclusive in all cases where a libel might be filed under it," that is, on "maritime causes of action covered by the Act." *Id.* at 327.

The *Johnson* ruling was made broadly to cover maritime causes of action which could be asserted in admiralty against the United States or governmental corporations and also against private operators for the Government.[19] *Fleet Corp.* v. *Lustgarten*, 280 U. S. 320, a companion case. But in *Brady* v. *Roosevelt S. S. Co.*, *supra*, the *Johnson* (*Lustgarten*) ruling was modified, in accordance with the obvious scope and purpose of the Act, to restrict the exclusiveness of the statutory remedy provided to causes asserted against the Government or governmental corporations. The Act, it was held in effect, did not affect or exclude the seaman's rights, in

[18] The Jones Act is "an integral part of the maritime law. . . ." Garrett v. Moore-McCormack Lines, 317 U. S. 239, 248.

[19] Four different cases were disposed of in the single opinion, including in addition to the Johnson case Fleet Corp. v. Lustgarten. In that case the defendants were the Fleet Corporation and the Consolidated Navigation Company, which operated the vessel for the United States as agent pursuant to an agreement with the Shipping Board. The suit was by a seaman injured in the ship's service allegedly for negligent failure of the defendants to furnish him a safe place to work and, further, furnish medical treatment and care after the injuries were incurred. 280 U. S. at 323. The judgment for the plaintiff was reversed as to both defendants, no mention being made in the opinion of any difference between them for applicability of the Suits in Admiralty Act or otherwise.

admiralty or otherwise, against the private operator. It merely substituted one remedy against the Government for what was, in substance, though not technically, another against it, that is, the libel *in personam* provided by § 2 for the libel in rem taken away by § 1.[20]

Prior to 1942, therefore, the privately employed seaman had not only his remedy under the Jones Act, but also his rights under the general maritime law enforceable in admiralty or by various forms of proceedings elsewhere. But even more favorably situated, under the *Bradu* ruling, was the seaman employed on vessels owned by the United States and operated for it by private companies under arrangements with the Fleet Corporation or the Maritime Commission.[21] He had his exclusive remedy against the Government or the appropriate governmental corporation, under the Suits in Admiralty Act, for all causes of action which could be maintained in admiralty if the vessel on which he was employed had been privately owned or operated; and, moreover, under the *Bradu* ruling he retained his rights under maritime law against the private company operating the vessel as agent for the Government.[22] Although never specifically decided here, this was

[20] The Court held the Johnson ruling as to the Navigation Co. to be untenable, expressly stating "that the *Lustgarten* case so far as it would prevent a private operator from being sued under the circumstances of this case must be considered no longer controlling." 317 U. S. at 578. See notes 19, 22.

It is to be noted that, although the decedent in the *Bradu* case for whose death the suit was brought was not a seaman, Lustgarten was. In both cases the cause of action asserted was negligence or maritime tort.

[21] The United States Shipping Board was established by 39 Stat. 729 and 41 Stat. 989. Section 11 of the earlier statute, 39 Stat. at 731, authorized the United States Shipping Board to establish government-controlled corporations, and pursuant to this provision the United States Shipping Board Merchant Fleet Corporation was set up. See Sloan Shipyards Corp. v. United States Shipping Board Merchant Fleet Corp., 258 U. S. 549, 561. By Executive Order No. 6166, June 10, 1933, § 12, the functions of the United States Shipping Board, including those of the Emergency Fleet Corporation, were transferred to the Department of Commerce. Subsequently, by the Merchant Marine Act of 1936, 49 Stat. 1987, the United States Maritime Commission was created and the functions and duties of the former Shipping Board were transferred to it.

[22] Under the standard forms of contract utilized for these arrangements by the Shipping Board and later by the Maritime Commission, the private operator, though designated as "agent" somewhat in the manner of the Administration's General Service Agreement, undertook to "man the ship" along with other duties assumed. Under this provision the shipping company rather than the Government was regarded as the seaman's employer. Accordingly he had all the rights incident to the employment as against this operating "agent," notwithstanding the vessel was owned by the Govern

held in *Carroll* v. *United States*, 133 F. 2d 690, to include not only general maritime rights such as the *Brady* case involved, but also recovery under the Jones Act. The *Carroll* case was decided flatly on authority of the *Brady* decision and the result was fully justified both by its ruling and by the terms of the Suits in Admiralty Act.[23]

Now it is argued that this favored position was altogether inverted when the Government took over control of the entire merchant marine under its war powers in 1942. For it is maintained and the Oregon Supreme Court has held, in effect, that this transfer stripped seamen of many, if not all, of their protections, including the remedy under the Jones Act, for the duration of the war and six months.[24] True, the decision applies specifically only to Jones Act proceedings. But it is equally applicable to all other maritime rights and remedies dependent upon existence of the "employer-employee" relation, such as the right to maintenance and cure, etc. Whenever, in such cases, it might be found that technically the Government is the employer, the necessary result would be to remit the seaman to the "exclusive" right to sue under the procedure provided by the Suits in Admiralty Act. In short the combined effects of that Act and of the transfer of

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ment. The Suits in Admiralty Act was not intended to and did not touch those rights. As stated in the text, its remedies were added to them.

Because the General Service Agreement omits the explicit requirement that the "agent" shall "man the ship," it is strongly argued and the Oregon Supreme Court held that the relation between the respondent and the seaman here is basically different from that existing under the Maritime Commission's standard arrangements since, it is said, that omission destroys the employer-employee relation between the "agent" and the seaman, and creates another, entirely different between the Government and the seaman. Cf. text *infra* at note 30.

[23] Cf. note 22. Effort has been made to restrict the scope of the *Brady* ruling, by regarding it as applicable only to the situation where the injury resulted from negligence of the private operating agency for which the Government or its sponsoring corporation would not be liable, in reliance upon the opinion's use of this situation to illustrate the fact that the Suits in Admiralty Act did not cut off general maritime rights and remedies against the operating agent. 317 U. S. at 581. But the ruling was broader both in rationalization and in result. The Court did not restrict possible recovery to such a situation in remanding the cause for determination of whether a cause of action had been made out.

[24] By which time the governmental pool presumably will have been dissolved, at any rate to the extent of returning many of the vessels comprising it to the private owners and operators. § 5, Clarification Act, 57 Stat 51, 50 U. S. C. App. § 1295; Title IV, § 401, First War Powers Act, 55 Stat 841, 50 U. S. C. App. § 621.

American shipping to governmental control, for the temporary period of the war, would be to confine merchant seamen altogether to suits under the Act, except in the cases of men employed on vessels under time-charter[25] and possibly as to injuries incurred by others through the general operating agent's failure to discharge some specific duty imposed by the General Service Agreement while the vessel is in port.[26] With those possible exceptions the various rights of seamen, enforceable by various proceedings in admiralty and at law, in state and federal courts, are swept into one hopper, the suit against the Government or governmental corporation under the Suits in Admiralty Act.

Such a result quite obviously would resurrect the *Lustgarten* (*Johnson*) ruling to override, in practical effect, that of the *Brady* decision for the duration of the war. Nor would only the forum and the procedure to be followed be affected. For, as the *Brady* opinion said of the *Lustgarten* ruling, the shorter limitations period of two years provided by the Suits in Admiralty Act would apply,[27] with the undoubted effect in many cases of barring recovery altogether. With a variety of rights established in law and custom, the sudden shift of all reliefs (except in the comparatively infrequent instances mentioned above, to the single forum and remedy could not but bring widespread surprise and resulting failure of substantive rights. Not only would wrong remedies be asserted only to discover the fact too late, as in this case and others in relation to which briefs *amicus curiae* have been filed,[28] But at least some claimants, perhaps many, relying upon the longer period

[25] Cf. text following note 4 *supra*. At the time of the Japanese surrender the total number of ships operated and owned by the War Shipping Administration was 4,363. Of these 537 were time-chartered from private operators and 405 were bareboat-chartered from private operators; 3,101 were operated under a General Service Agreement. See also note 1.

[26] Such as, e.g., failing to provide needed repairs or supplies, but not including any act attributable to negligence on the part of the master or other members of the crew. Cf. note 23.

[27] 317 U. S. at 581, citing § 5 of the Act, and Emergency Fleet Corp. v. Rosenberg Bros. & Co., 276 U. S. 202. The period provided under the Jones Act, for instance, is three years. 46 U. S. C. § 56.

[28] One of the briefs *amicus curiae* states that the seaman's widow for whom it is filed has instituted suit against the shipping company within two years after her husband's death but that, inasmuch as no suit against the United States has been instituted within that period, if her cause of action against the shipping company will not lie, she will also be unable by virtue of the Statute of Limitations in the Suits in Admiralty Act to sue the United States.

incorporated in the body of our law, would delay instituting suit beyond the shorter one allowed by the temporary expansion of the Suits in Admiralty Act to cover war conditions, and thus be trapped into loss of all remedy at a time when broad relief was needed more than ever.

There would be other uncertainties and complexities. Were respondent's position to prevail, a seaman would be forced to predict, before instituting his suit, whether at the end of the litigation it would turn out that the cause of action alleged should have been asserted against the Government or against the private operator. Thus, it might often be difficult to foretell whether the negligence alleged to have caused the injury would be attributed ultimately, as the proof should turn out, to some act of the master or a member of the crew; in which event only the Government, not the operating agent, would be liable, or to some default of that agent in discharging its specially limited but various duties, in which case it and at least in some instances not the Government[29] would be responsible. The only safe course for a claimant in doubt—and obviously many such situations might arise—would be to file two suits, one a libel *in personam* against the Government, the other an appropriate proceeding against the agent; and possibly even so the risk might remain that the division of remedies would result in loss of relief altogether.

In addition it should be mentioned that under the practice of the industry seamen frequently would move back and forth between vessels of the same owner moored side by side, from ships under time-charter to others under bareboat-charter to the Administration. With each such shift, under respondent's view of the law, responsibility for the seaman's injuries would shift from the agent to the Government or the other way around, with corresponding shuttling of remedy. The confusion thus resulting was one reason which led to adoption of the Classification Act. S. Rep. No. 62, 78th Cong., 1st Sess., 5; H. Rep. No. 2572, 77th Cong., 2d Sess., 23, quoted infra at note 32.

These are at least some of the uncertainties and complexities which would result from acceptance of respondent's view. It is hardly too much to say that substantive rights would be lost in an

[29] As in the case, suggested in the *Brady* opinion, in which the agent alone and not the principal would be liable. 317 U. S. at 581. See note 23.

incalculable number of cases by the disruption such an acceptance would bring for rights long settled. The result also would be to throw large additional numbers into confusion which in the end could only defeat many of them.

II.

We may assume that Congress could authorize so vast a disturbance to settled rights by clear and unequivocal command. It is not permissible to find one by implication. *Brady* v. *Roosevelt S.S. Co.*, *supra*, at 580. Here the disruption, if it has occurred, has done so only as an implied result of the conjunction of the Suits in Admiralty Act's provisions with the Government's emergency action in taking over the shipping industry for war purposes.

Apart from resurrecting the *Lustgarten* ruling in the face of the *Brady* reversal, this result could be reached only by finding that Congress, or Congress and the President, intended to bring it about by the exercise of their powers to bring the industry under governmental control. No other legislation, or executive action, remotely could be thought to have that effect.

Certainly this was not the purpose of the Suits in Admiralty Act. As we have said, its effect was to expand, not to restrict, the seaman's rights, as *Brady* decided. Moreover, it was not an emergency measure, adopted to promote the war effort. It was normal, peacetime legislation, fitting into a settled scheme of private rights. There can be no inference from its terms or history that it was intended to displace that scheme entirely or in large part, in normal times or in the emergency of war. To give its letter this effect, because the war brought about the temporary transfer of the industry to governmental control, would be to pervert its whole purpose.

We are told, however, that the Jones Act applies by its specific terms only in the presence of the relation of employer to employee, to give the latter a remedy for the employer's negligence; and, since the effect of the General Service Agreement was to make the seaman technically an employee of the United States, the necessary result was to remit him exclusively to the Suits in Admiralty Act for remedy to enforce the substantive right given by the Jones Act.

The premise is not controlling. We may accept the Oregon court's conclusion that technically the agreement made Hust an employee of the United States for purposes of ultimate control in the performance of his work, although the meticulous differences in this respect between its terms and the corresponding provisions of the Maritime Commission's standard contract make it hardly more than dubious that respondent did not stand *pro hac vice* as employer with the Government.[30] But it does not follow from the fact that Hust was technically the Government's employee that he lost all remedies against the operating "agent" for such injuries as he incurred. This case, like *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, involves something more than mere application to the facts of the common-law test for ascertaining the vicarious responsibilities of a private employer for tortious conduct of an employee.

Here indeed is the respondent's fallacy, for it assumes the case would be controlled by the common-law rules of private agency.[31] It is true these are applied in the normal everyday applications of the Jones Act. But in those situations this is done to determine who comes within, who without the covered class in the Act's normal operation, not to exclude that class entirely or in large part. Here the application is made to defeat the Act for all except

[30] See note 10. "These questions arise because of a *technical* status of such seamen as employees of the United States by virtue of their employment through the War Shipping Administration for service on such vessels." S. Rep. No. 62, 78th Cong., 1st Sess., 5. (Emphasis added.) The chief differences between the relationship of the managing agent in the *Brady* case to the seamen and the relationship of the respondent to the seamen are, as set out in the contracts, as follows:

Under the agreement in the *Brady* case the managing agent agreed to man the vessels. The licensed officers and chief steward, however, were subject to the approval of the owner, the United States, which also had the right to remove any employees "if it shall have reason to be dissatisfied."

Under the General Agent Service Agreement the shipping company does not agree to man the vessel. It agrees to procure the master, subject to the approval of the United States. The master is an agent and employee of the United States and has complete responsibility and authority with respect to the navigation and management of the vessel. The general agent agrees to procure officers and men through the usual channels and in accordance with the customary practices of commercial operators and to make them available to the master. It is provided that officers and members of the crew "shall be subject only to the orders of the Master."

[31] See text *supra* preceding note 10. The opinion stated: "We think it must be assumed in determining whether the plaintiff was an employee of the defendant that the case is governed by the rule of the common law." 158 P. 2d 275, 278.

the smaller number of men whom it was enacted to protect. No such application of the common-law "control" test can be justified in this temporary situation unless by inversion of that wisdom which teaches that "the letter killeth, but the spirit giveth life."

Not always does the law proceed in disregard of that truth. There was nothing to prevent Congress or the President, acting in exercise of their authority, from shifting the technical relation of employer and employee from the general agent to the Government, for purposes relevant to ultimate wartime control of marine employees, without at the same time disrupting their normally applicable rights and remedies. On the contrary, there was every reason why the change should be made without that consequence. No presumption can be indulged that any purpose existed to take away those protections when they were needed more than ever, nor any that so great a disruption would be made for only the emergency of the war period. Nothing in the Jones Act, the Suits in Admiralty Act, or in the War Powers Act of 1941 and the Executive Orders by which the industry's transfer was accomplished compels such a conclusion.

III.

Confirmation of this is furnished by the legislative history of the Clarification Act and by its retroactive provisions relative to the seaman's rights, including remedies on account of personal injury and death. Indeed one primary occasion for enacting the Clarification Act was to save the seaman's rights in these respects rather than to take them away.[32]

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[32] "The basic scope and philosophy of the measure is to preserve private rights of seamen while utilizing the merchant marine to the utmost for public wartime benefit. Except in rare cases the ships themselves are being operated as merchant vessels, and are therefore subject to the Suits in Admiralty Act in all respects. Granting seamen rights to sue under that act is therefore entirely consistent with the underlying pattern of the measure." S. Rep. No. 62, 78th Cong., 1st Sess., 11.

"Present-day operating conditions often make uncertain whether the vessel is a merchant or a public vessel. As a consequence the aforementioned rights [rights under the Jones Act and the general maritime law] of such seamen are frequently in doubt. In addition to these rights which, at times, are uncertain for the reasons mentioned, the seamen who are employees of the United States probably have rights under the United States Employees' Compensation Act in the event of injury or death. Such compensation benefits are not presently enjoyed by seamen under private employment. Thus vital differences in these rights are made to depend upon whether the seaman happens to be employed aboard a vessel time-chartered to the War Shipping Administration or owned by or bareboat-chartered to the War Shipping Ad-

"It is true there was great concern for fear that those rights had been lost or seriously attenuated by the transfer to governmental control, particularly during the earlier stages of congressional consideration when the *Brady* decision had not removed the large cloud cast over them by the *Lustgarten* ruling. Nor did *Brady* remove all of the doubt in the minds of those sponsoring the bill, as the committee reports during the later stages of consideration disclose.[33] Hence, to make certain that the seamen would have at least the remedy provided by the Suits in Admiralty Act for enforcement of his substantive rights, as well as to take care of other important matters not affecting them,[34] the bill proceeded to enactment.

We need not determine in this case whether prospectively the Clarification Act affected rights of the seaman against the operating agent and others, or simply made sure that his rights were enforceable against the Government. We make no suggestion in that respect. For this case, on the facts, is not governed by the statute's prospective operation.[35] It may be noted however that,

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ministration. Since seamen constantly change from one vessel to another, their rights for death, injury, or illness also constantly change depending upon the relationship of the War Shipping Administration to the vessel. This fluctuation and lack of uniformity of rights leads to dependency of vital rights upon chance with a result of confusion and inequities. 'The bill is designed to remove this confusion and these inequities.'" H. Rep. No. 2572, 77th Cong., 2d Sess., 9.

[33] See notes 36 and 37 and text.

[34] See §§ 3 and 4 of the Clarification Act. These relate to payment of just compensation for vessels requisitioned, war risk insurance, limitation of liability for the War Shipping Administration, and other miscellaneous matters. Section 1 of the Act provided that the seamen "because of the temporary wartime character of their employment by the War Shipping Administration" should not be considered as officers or employees of the United States for the purposes of various specified acts, including the United States Compensation Act.

[35] The provision principally affecting rights like those now in question was § 1: "(a) Officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. . . . Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the

if respondent's contention were the law, the provisions of § 1, authorizing enforcement of the seaman's substantive rights for injury, maintenance and cure, etc., by the Suits in Admiralty Act remedy, would do no more than reaffirm what the latter Act had provided all along.

The Clarification Act, however, is not without important bearing for solution of the problem this case presents. For whatever the effect of its prospectively operating provisions upon the seaman's rights as against others than the Government, the bill in its final form contained a provision designed and effective to prevent the loss of such rights as petitioner now asserts.

Section 1 of the Act contains the following provision which is in terms applicable to this case:

> "Any claim, right, or cause of action of or in respect of any seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration."[36]

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vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. . . . ." 57 Stat. 45.

[36] H. Rep. No. 2572, 2d Sess., 15, states: "Special provision is made with respect to rights and with respect to claims and causes involved in section 1(a) (2) and (3) which may have accrued on or after October 1, 1941, and prior to the date of enactment of the measure. Under this provision the seaman or other claimant may elect to enforce the claim as if section 1 had been in effect at the time the claim accrued. In exercising this option the claimant would be prevented from proceeding to secure double recovery under other procedure without regard to section 1, and would be bound by the applicable statutes or principle of limitations.

"Inasmuch as certain vessel operations on account of the Government were undertaken prior to the establishment of the War Shipping Administration by or through the Maritime Commission the provisions of section 1 and all amendments therein are made applicable to the United States Mari-

One obvious purpose of this provision was to extend retroactively to the seaman the benefit of the assured remedy against the Government given by § 1. But equally obvious is the intent to save such other rights as the seaman may have had and to give him an election between enforcing them in the usual manner and asserting them in a suit against the United States in the manner provided by § 1.

The provision was inserted in the bill after the *Bra* Uncertain in scope as the effects of the *Brady* decision were regarded to be, they were clearly recognized as holding that the seaman had rights against private operators arising after the transfer of governmental control.[37] ~~mizer as holding that the seaman had rights against private operators arising after the transfer of governmental control.~~[37] Respondent's view of the law would nullify the election given. For in that view, even before the Classification Act was adopted, the seaman's exclusive remedy for injuries incurred after the transfer was by suit under the Suits in Admiralty procedure. But § 1 expressly gives election between that identical remedy, as conferred by the Clarification Act, and preexisting remedies. It is too obvious to require statement that if the seaman's only remedy for injuries incurred before the Clarification Act became effective was under the Suits in Admiralty Act, as respondent contends, the election given by § 1 becomes no election whatever.

It is true that Congress did not enumerate the specific rights which it considered seamen to have prior to the Clarification Act and after the industry's transfer to governmental control. To have done so, in view of its own uncertainty in this respect, including the effects of the *Brady* decision, would have been hazardous. The intent is clear, nevertheless, in the retroactive provision to preserve all such rights and remedies as may have remained in

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time Commission with respect to the period beginning October 1, 1941, to the time of taking office of the Administrator, War Shipping Administration (February 11, 1942)."

And in S. Rep. No. 1813, 77th Cong., 2d Sess., 6, it was stated: "Section 1 makes full provision with respect to rights and claims which may have accrued during the early months of the war or its imminence, and prior to the enactment of the bill. This provision is necessary in view of vessel operations by or through the Maritime Commission in the period prior to taking office of the Administrator, War Shipping Administration (February 11, 1942)."

[37] Cf. S. Rep. No. 62, 78th Cong., 1st Sess., 8, 17; H. Rep. No. 107, 78th Cong., 1st Sess., 5, 29. These reports construe the effects of the *Brady* decision more narrowly than we have done in this case and than the decision justifies.

existence unaffected by the transfer. For the reasons we have stated we think these included the remedy provided by the Jones Act as well as the substantive right.

The mere fact that the terms of the Standard agreement were changed to omit the provision for manning the ship and substitute the provisions relating to employees contained in the General Service Agreement was not, in these circumstances enough to deprive seamen of that remedy. We do not think either Congress or the President intended to bring about such a result by the transfer of the industry to temporary governmental control. If this made them technically and temporarily employees of the United States, it did not sever altogether their relation to the operating agent, either for purposes of securing employment or for other important functions relating to it.[38] Nor did it disrupt the long-established scheme of rights and remedies provided by law to secure in various ways the seaman's personal safety, either to deprive him of those rights altogether[39] or to dilute or reduce them to the single mode of enforcement by the Suits in Admiralty Act procedure.

This result is in accord with the spirit and policy of other provisions of the General Service Agreement. The managing agent selected the men, and did so by the usual procedure of dealing with the duly designated collective bargaining agent. It delivered them their pay, although from funds provided by the Government. It was authorized specifically to pay claims not only for wages, but also for personal injury and death incurred in the course of employment, for maintenance and cure, etc.[40]

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[38] See notes 39 and 40.

[39] On respondent's contention it is assumed that, before the Classification Act took effect, the Government could be sued under the Suits in Admiralty Act for recovery in this and similar cases. Whether and how far that Act would have permitted suits by seamen injured in the course of their employment prior to the Classification Act's effective date need not be determined in this case.

[40] "To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures, accruing during the term hereof, in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, *maintenance, cure,* vacation allowances, *damages or compensation for death or personal injury or illness,* and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements, or by action of the Maritime War Emergency Board. . . ." (Emphasis added.)

The General Agent Service Agreement provides that officers and members of the crew "shall be paid in the customary manner with funds provided by

It was responsible for keeping the ship in repair and for providing the seaman's supplies. For all of these expenditures not covered by insurance the contract purported expressly to provide for indemnity from the Government.[41]

With so much of the former relation thus retained and so little of additional risk thrown on the operating agent, it would be inconsonant not only with the prevailing law, but also with the agreement's spirit and general purpose to observe and keep in effect the seaman's ordinary and usual rights except as expressly nullified, for us to rule that he was deprived of his long existing scheme of remedies and remitted either to none or to a doubtful single mode of relief by suit against the Government *in personam* in admiralty. Our result also is in accord with the general policy of the Government and of the War Shipping Administration that those rights should be preserved and maintained, as completely as might be possible under existing law, against impairment due to the transfer.[42]

A further word remains to be said about the legislative history of the Clarification Act in general. Both parties have relied strongly on excerpted portions thought to support their respective views. As is true with respect to all such materials, it is possible to extract particular segments from the immediate and total context and come out with road signs pointing in opposite directions. We do not undertake to illustrate the contrast from the history in this case. It can be said, however, with assurance that, taken as a whole, the committee reports in Congress, together with appended documents from various affected agencies and officials, are amorphous in relation to the crucial problem presented in this case. All of them give evidence of concern that rights may have been lost or rendered uncertain by the transfer, and that

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the United States hereunder." The proof at trial showed that petitioner was paid his wages by the ship's purser, the money being in envelopes bearing the name of respondent.

41 See note 40. The General Agent Service Agreement also provides that the United States shall procure insurance against all insurance risks "of whatsoever nature or kind relating to the vessels assigned hereunder" and "shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense . . . to the extent not covered or not fully covered by insurance."

Compare the provisions of §§ 2 and 3 of the Clarification Act with respect to insurance and compensation as they affect seamen.

42 See notes 32, 40, 41.

action should be taken by Congress to preserve the substantive rights intact and remedial ones at the least by extension of the Suits in Admiralty Act to cover them.

The entire history will be read in vain, however, for any clear expression of intent or purpose to take away rights, substantive or remedial, of which the seaman had not already been deprived, actually or possibly, by virtue of the transfer. Whether or not this conserving intent was made effective in the prospectively operating provisions of the Act, it is made clear beyond question in the retroactive ones. Congress was confessedly in a state of uncertainty. But, being so, it nevertheless had no purpose to destroy rights already accrued and in force, whether substantive or remedial in character. Its object, in this respect at the least, was to preserve them and at the same time to provide an additional assured remedy in case what had been preserved might turn out for some reason to be either doubtful or lost.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 625.—October Term, 1945.

Cecil I. Hust, Petitioner, vs. Moore-McCormack Lines, Inc. } On Writ of Certiorari to the Supreme Court of the State of Oregon.

[June 10, 1946.]

Mr. Justice Douglas, with whom Mr. Justice Black agrees, concurring.

While I have joined in the opinion of the Court, I add a few words to indicate that the result we have reached is consonant with the traditional rules of liability.

A charterer who obtains exclusive possession and management of the vessel from the owner is owner *pro hac vice* and subject to the responsibilities of ownership for the duration of the charter period. *Reed* v. *United States*, 11 Wall. 591, 600-601; *Leary* v. *United States*, 14 Wall. 607, 610; *United States* v. *Shea*, 152 U. S. 178. The question whether exclusive possession and management of the vessel have been transferred to the charterer turns on the facts of each case—a construction of the agreement between the parties and the conduct of the parties under the arrangement. *United States* v. *Shea*, *supra*, pp. 189-191.

This agreement provides that the General Agent is appointed "to manage and conduct the business of vessels assigned to it by the United States from time to time." Art. 1. The General Agent promises "to manage and conduct the business for the United States" of such vessels as have been "assigned to and accepted by the General Agent." Art. 2. The United States has the power on specified notice to terminate the agreement and "to assume control forthwith" of the vessels. Art. 11. On termination "all vessels and other property of whatsoever kind then in the custody of the General Agent" are to be "immediately turned over to the United States." Art. 12. The fair intendment of these provisions is that possession of the vessels passes to the General Agent under the agreement.

Management of the vessels also is granted the General Agent. It is to "maintain the vessels in such trade or service as the

United States may direct." Art. 3. It is the one to "equip, victual, supply and maintain the vessels." *Id.* It shall "procure the Master of the vessels . . . subject to the approval of the United States." *Id.* It shall "procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel." *Id.* The officers and men are to be "procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time." *Id.* The General Agent shall "arrange for the repair of the vessels." Art. 14.

All of these things are done, to be sure, for the account of the United States. The agreement, moreover, specifically provides that the Master is "an agent and employee of the United States." Art. 3. The officers and crew are subject "only to the orders of the Master." Art. 3. And the shipping articles which were entered into were between the master and the crew. From this it is argued that the members of the crew were employees of the United States, not of the General Agent or operator.

The shipping articles, however, are by statute required to be an engagement between the master and the crew. 38 Stat. 1168, 46 U. S. C. § 713. The responsibility of the master for the operation of the vessel is, moreover, traditional. See *United States* v. *Farnham*, 25 Fed. Cas. No. 15,071, pp. 1042, 1045. So the case for respondent comes down essentially to the provision in the agreement that the Master is the agent and employee of the United States.

If the parties to a contract could by the choice of a label determine these questions of responsibility to third persons the problem would be simple. But the conventions of the parties do not determine in the eyes of the law the rights of third persons. *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, 583. The Court dealt with one species of this problem in *Knights of Pythias* v. *Withers*, 177 U. S. 260, where an insurance policy designated the person to whom premiums were paid as the agent of the insured, not the agent of the insurer. The Court said, p. 268:

> "The reports are by no means barren of cases turning upon the proper construction of this so-called 'agency clause,' under which the defendant seeks to shift its responsibility

upon the insured for the neglect of Chadwick to remit on the proper day. In some jurisdictions it is held to be practically void and of no effect; in others it is looked upon as a species of wild animal, lying in wait and ready to spring upon the unwary policyholder, and in all it is eyed with suspicion and construed with great strictness. We think it should not be given effect when manifestly contrary to the facts of the case, or opposed to the interests of justice."

This problem of liability to third persons is resolved by determining whose enterprise the particular venture was. The fact that the parties say it is the enterprise of one, not the other, is not decisive. Control in the operation and management of the business, as distinguished from general supervision, is the customary test. I look in vain to find in the present arrangement any evidence that the owner acted as the manager of this business. Respondent, the General Agent, had a most substantial measure of control over the operations of the vessels. Its *de facto* control was no whit less or more whether the master were called the agent of the owner or its own agent. The case is not one where an agent attends only to the business of a vessel as distinguished from its manning or physical operation or control. Respondent maintains the vessels in the broadest sense and procures the master and crew. In the *Brady* case the operator was "to man, equip, victual, supply and operate the vessels." 317 U. S. p. 576. The same was true in *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190, 191. But the difference in words between the agreements in those cases and the present one does not, on a view of the entire situation, mark a difference in functions of the private operator. It is, indeed, difficult to see how the functions of the private operator were in any way changed under this agreement from what they were in those other two cases. Respondent, of course, accounts for its operations to the United States. The United States reimburses it for all of its expenditures, including the wages of the crew. But it is immaterial that the owner provides the entire crew and pays their wages. A charterer who has control of the operations is owner *pro hac vice*. *Hills* v. *Leeds*, 149 Fed. 878. So far as this record reveals the operator performed all of the functions which it performed in the *Brady* and *Quinn* cases. There is here no taking over of additional functions by the owner. The arrangement is clothed in different garb. But it is the private operator who manages and controls the physical operation. The powers

reserved to the owner were general supervisory powers adequate for the exigencies of the war time conditions which prevailed. But they did not detract from the powers of physical operation granted respondent.

The fact that we have here no more than a change in form not in substance is borne out by collateral phases of this undertaking. The compensation of respondent is not to be less than "the amount of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942." Art. 5. The United States agrees to reimburse respondent for "damages or compensation for death or personal injury or illness" required to be paid. Art. 7. It also agrees to reimburse respondent for payments made by respondent to a pension fund for officers and members of the crew, as well as for "social security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise." *Id.*

These provisions all suggest, as the relationship of the parties bears out, that the United States was the underwriter of the financial risks of the venture,[1] the operator continuing as it always had to perform the managerial functions. These managerial functions constitute control, decisive of liability in this case. There was no demise. But the form of the agreement is not important if the functions of the operator were those of an owner *pro hoc vice*. I think that is the true condition which existed here.

At common law respondent would be the principal, for the business of managing and operating the vessel was its business. It was therefore the employer and responsible for this personal injury claim.

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[1] See S Rep. No. 898, 74th Cong., 1st Sess., pp. 39-40.

SUPREME COURT OF THE UNITED STATES.

No. 625.—October Term, 1945.

Cecil I. Hust, Petitioner,
vs.
Moore-McCormack Lines, Inc.

On Writ of Certiorari to the Supreme Court of the State of Oregon.

[June 10, 1946.]

Mr. Justice Reed, dissenting.

Petitioner, Hust, a fireman and watertender on the S. S. Mark Hanna, brought an action in an Oregon Circuit Court[1] against the respondent, the Moore-McCormack Lines, Inc. The suit was under the Merchant Marine Act of 1920, the Jones Act, Section 33.[2] It sought damages against the respondent as employer. As Section 33 shows on its face, a seaman has the advantages of the Federal Employers Liability Act only against his employer.[3] The judgment of the Supreme Court of Oregon denying petitioner the right to recover in this action would then be correct unless the respondent is petitioner's employer or unless Congressional legislation since the Merchant Marine Act grants petitioner a right of recovery against respondent even though the employer-employee relationship does not exist.

The S. S. Mark Hanna, a Liberty ship, was owned by the United States. So far as appears from the record, it had never belonged to anyone else. Its operation was under the direction of the War Shipping Administration. In order to carry out its responsi-

[1] See Garrett *v.* Moore-McCormack Co., 317 U. S. 239, 245.

[2] 41 Stat. 1007, 46 U. S. C. § 688:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ."

[3] Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 389; Nolan *v.* General Seafoods Corporation, 142 F. 2d 515, 517; The Norland, 101 F. 2d 967; Baker *v.* Moore-McCormack Lines, Inc., 57 F. Supp. 207, 208; Eggleston *v.* Republic Steel Corporation, 47 F. Supp. 658, 659; Gardiner *v.* Agwilines, Inc., 29 F. Supp. 348.

Compare Robinson *v.* Balt. & Ohio R. R., 237 U. S. 84, 94:

"We are of the opinion that Congress used the words 'employé' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employé."

Hull *v.* Phila. & Reading Ry. Co., 252 U. S. 475.

bilities, the Administration employed respondent as its General Agent to conduct the business of certain ships assigned to respondent for handling. From the excerpts from the contract, set out below, we think it clear that this was a conventional agency contract under which respondent managed certain matters connected with the ship for the United States. We think it clear, as did the Supreme Court of Oregon, that so far as the crew is concerned the respondent only procured the members, such as Hust, and made them available to the Master, a United States agent, for employment by said Master for the account of the United States.[4] Such a contract makes the United States the employer under the Merchant Marine Act, not the Master and not respondent, the General Agent. This is an action under the Merchant Marine Act and the question of liability of the respondent for any negligence under any other statute or rule of law, admiralty or otherwise, is not before us.

Since 1920 employees of the United States upon merchant vessels of the United States have had a right of action in admiralty against the vessels in all cases where the employees would have had a right if the vessel were privately owned or operated. This

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[4] "Witnesseth: That in consideration of the reciprocal undertakings and promises of the parties herein expressed

"Article 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time.

"Article 2. The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to and accepted by the General Agent for that purpose.

"Article 3A. To the best of its ability, the General Agent shall for the account of the United States:

"(d) The General Agent shall procure the Masters of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility, and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

came from Section 2 of the Suits in Admiralty Act.[5] This right of action was enforceable exclusively in admiralty.[6] There was no right to a trial and assessment of damages by a jury.

When the War Shipping Administration became the operator of practically the entire American merchant marine, doubts sometimes arose as to whether a particular vessel was a "merchant" vessel, operated by the United States or not. Therefore to clarify this situation and to assure all "employees of the United States through the War Shipping Administration" all "rights" for "injuries" applicable to seamen "employed on privately owned and operated American vessels," Congress enacted an act to clarify the law relating to functions of the Administration. Provisions from the first section which are important here are set out below.[7]

As will be seen by an examination of the reports of the House and Senate[8] in connection with the specific requirement of the first section, *supra*, for enforcement of these rights, Congress declared its purpose in no uncertain terms to grant the power to enforce these rights only through the Suits in Admiralty Act. That is, the

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[5] 41 Stat. 525, 26:

"Sec. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. . . ."

[6] Fleet Corp. v. Rosenberg Bros., 276 U. S. 262; Johnson v. Fleet Corporation, 280 U. S. 320.

[7] 57 Stat. 45-46:

"That (a) officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to . . . (2) death, injuries, illness, . . . have all of the rights, benefits, exemption, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. . . . Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. . . ."

[8] S. Rep. No. 62, 78th Cong., 1st Sess.; H. Rep. No. 107, 78th Cong., 1st Sess.

seaman could not submit his claim to a jury.[9] It will be noted that the words "right" and "status" are used with care, so that it is plain Congress intended to give all Administration seamen rights under the Merchant Marine Act and remedies under the Suits in Admiralty Act.

As there might be instances where a seaman was an employee of the Administration but his boat was not a merchant vessel of

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9. This purpose is made plain by a few excerpts from the reports.
S. Rep. No. 62, 78th Cong., 1st Sess., pp. 5-6, 11, 14:

"Seamen employed as Government employees on vessels owned by, or bareboat-chartered to, the War Shipping Administration are sometimes precluded from enforcing against the United States the rights and benefits in case of death, injury, illness, detention, and so on that would be available to them if employed by private employers, except under the Suits in Admiralty Act. If they were private employees, rights to redress for death, injury, or illness could be prosecuted under the Jones Act and the general maritime law. These same rights may be asserted against the United States as the employer under the Suits in Admiralty Act providing the vessel involved is a merchant vessel. In case of public vessels the seaman must rely for compensation upon the Administrator's policy recognizing contractual liability which this legislation recognizes. Present-day operating conditions often make uncertain in some cases whether the vessel is a merchant or a public vessel. As a consequence, even though the vessels are generally merchant vessels and not public vessels, there are some cases in which the aforementioned rights of such seamen are in doubt. In addition to these rights which, at times, are uncertain for the reasons mentioned, the seamen who are employees of the United States probably have rights under the United States Employees' Compensation Act in the event of injury or death. Such compensation benefits are not presently enjoyed by seamen under private employment. Thus vital differences in these rights are made to depend upon whether the seaman happens to be employed aboard a vessel time-chartered to the War Shipping Administration or owned by or bareboat-chartered to the War Shipping Administration. Since seamen constantly change from one vessel to another, their rights for death, injury, or illness also constantly change, depending upon the relationship of the War Shipping Administration to the vessel. This fluctuation and lack of uniformity of rights leads to dependency of vital rights upon chance with a result of confusion and inequities. The bill is designed to remove this confusion and these inequities. The bill does not affect seamen employed on vessels time-chartered to the War Shipping Administration where the vessels are supplied with crews employed by the company from which the vessel is chartered. As to them their status and the status of the Government employees mentioned will be made uniform.

. . . They will continue to have the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances, and they (and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. Such seamen will have the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act, except that claims with respect to social-security benefits shall be prosecuted in accordance with the procedure provided in the social-security law. . . .

The provision of the Suits in Admiralty Act that suit lies thereunder only if the ship involved is employed as a merchant vessel or a tugboat is waived for the purposes of section 1 so that the claim may be enforced regardless of

the United States, the clarification act of March 24, 1943, was made retroactive to October 1, 1941.[10] Probably other compensation for injuries may have existed prior to the enactment of this act.

If is said by the Court that if a seaman employed by the United States is limited to the remedies of the Suits in Admiralty Act for recovery in tort, the holding in *Emergency Fleet Corp.* v. *Lust-*

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the nature of the vessel on which the seaman is serving as an employee of the War Shipping Administration. To prevent unnecessary or premature litigation against the United States, it is required that, before suit there shall be an administrative disallowance of the same in accord with rules or regulations to be prescribed by the Administrator, War Shipping Administration."

H. Rep. No. 107, 78th Cong., 1st Sess., pp. 3, 21:

"The basic scope and philosophy of the measure is to preserve private rights of seamen while utilizing the merchant marine to the utmost for public wartime benefit. Except in rare cases the ships themselves are being operated as merchant vessels, and are therefore subject to the Suits in Admiralty Act. Granting seamen rights to sue under that act is therefore entirely consistent with the underlying pattern of the measure. This should follow even in the extraordinary case where vessels might otherwise technically be classed as public vessels.

"The various rights and remedies under statute and general maritime law with respect to death, injury, illness and other casualty to seamen, have been rather fully set forth hereinabove. Under clause 2 of section 1(a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942). The provision of the Suits in Admiralty Act that suit lies thereunder only if the ship involved is employed as a merchant vessel or a tugboat is waived for the purposes of section 1 so that the claim may be enforced regardless of the nature of the vessel on which the seaman is serving as an employee of the War Shipping Administration. To prevent unnecessary or premature litigation against the United States, it is required that before suit there shall be an administrative disallowance of the same in accord with rules or regulations to be prescribed by the Administrator, War Shipping Administration."

The desirability of a jury trial was commented upon by a representative of the National Maritime Union and the Attorney General in reply. See Hearings on H. R. 7424, House Committee on Merchant Marine & Fisheries, 77th Cong., 2d Sess., pp. 30-33.

[10] S. Rep. No. 62, p. 13:

"Inasmuch as certain vessel operations on account of the Government were undertaken prior to the establishment of the War Shipping Administration by or through the Maritime Commission, the provisions of section 1 and all amendments therein are made applicable to the United States Maritime Commission with respect to the period beginning October 1, 1941, to the time of taking office of the Administrator, War Shipping Administration (February 11, 1942). To avoid administrative confusion and uncertainty as to the exact status of employment of seamen employed on War Shipping Administration vessels, it is provided that seamen employed through that agency shall be included under the provisions of section 1 even though the seamen may be em-

garten, 280 U. S. 320, is restored as a rule of law. The *Lustgarten* case was overruled by *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, 578. We think that this misconceives the effect of the *Brady* case. We do not think the requirement that seamen, employees of the United States, must seek their remedy against their employer under the Suits in Admiralty Act has any relation to the *Lustagten* or *Brady* cases.

Lustgarten, a seaman, sought recovery at law for a tort against the Navigation Company, an agent of the United States. It was held that he could only recover under the Suits in Admiralty Act. In the *Brady* case, under a petition of a visitor to the boat to recover against a similar agent, it was held a cause of action in tort at law would lie. The *Lustgarten* case was overruled. The only effect of the *Brady* decision was to hold that actions could be maintained against agents of the United States at common law for the agent's own torts. The case had nothing whatever to do with the right to recover against employers under the Jones Act. The opinion said, 317 U. S. at 577, "The sole question here is whether the Suits in Admiralty Act makes private operators such as respondent non-suable for their torts." "The liability of an agent for his own negligence has long been embedded in the law." *Id.*, at 580, "'But it is a *non sequitur* to say that because the Act takes away the remedy of libel *in rem* in all cases involving government vessels and restricts the remedies against the United States and its wholly owned corporations, it must be presumed to have abolished all right to proceed against all other parties.'" *Id.*, at 582. "The question is not whether the Commission had authority to delegate to respondent responsibilities for managing and operating the vessel as its agent. It is whether respondent can escape liability for a negligent exercise of that delegated power if we assume that by contract it will be exonerated or indemnified for any damages it must pay." *Id.*, at 583-84. The case was then sent back to the Circuit Court of Appeals to determine whether a

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ployed on a vessel chartered or made available to another department or agency of the United States for purposes of convenience in the war effort.

"With respect to seamen on foreign-flag vessels, the remedy provided by this legislation is, of course, in substitution for remedies that might exist under the laws of a country in which the vessel may be documented, and seamen proceeding under this section by such choice of remedies will have waived benefits under laws of any other country that might otherwise be available."

See also H. Report No. 107, *supra*, pp. 21 and 22.

cause of action against the agent was established. All that was meant or said in *Brady* about *Lustgarten* was that the *Lustgarten* case was in error in saying that a seaman could not sue an agent for the agent's own tort. The *Brady* final statement on *Lustgarten* was, "Our conclusion, however, is that that position is untenable and that the *Lustgarten* case so far as it would prevent a private operator from being sued under the circumstances of this case must be considered as no longer controlling." *Id.*, at 578. There is no reason here why the petitioner should not sue respondent for its alleged tort. What petitioner is attempting is to hold respondent liable as employer for negligence of petitioner's fellow servants, of petitioner's superiors or the Master under the Merchant Marine Act. This it cannot do under this record.[11]

It is suggested that the respondent may be in the position of an employer, as a charterer or owner pro hac vice. But a charterer or owner pro hac vice, who is also an employer, is one who takes over "the exclusive possession, command, and navigation of the vessel." *Reed* v. *United States*, 11 Wall. 591, 600. ~~This~~ That is a bareboat charter. Under the contract in this case, the respondent had no such authority. As we have pointed out above, and as the contract shows, he acted for the United States under its command and then only in certain matters not connected with actual navigation.

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[11] 158 P. 2d 275, 276, 277-78, 282, 287-88:

"On the trial the defendant moved for a directed verdict on the grounds that the evidence showed that the plaintiff was not employed by it and that his injury was not caused by its negligence. The court denied the motion, and in its charge left it to the jury to determine as a question of fact whether the relation of employer and employee existed between defendant and plaintiff."

"There is no evidence that the defendant did anything in connection with the business of the vessel not contemplated by the terms of the service agreement, or that it exercised or attempted to exercise any control over the master or crew. Indeed, the uncontradicted evidence is that when it was the duty of the defendant to assist in the loading of the vessel it acted under the instructions of the master as to the time, place and method of loading."

"As stated, the trial judge left to the jury the question of employer-employee relationship as one of fact. The propriety of that submission is not defended here, and it seems to be agreed by both parties that the question is one of law to be determined by the court. Of the correctness of this view we think there can be no doubt."

"We find no such basis of liability in this case. The defendant was not responsible for a negligent order of the boatswain which sent the plaintiff into a place of danger. There is no evidence that the vessel was not properly equipped when it started on its voyage."

The Court does not challenge the respondent's assertion that the Merchant Marine Act requires the employer-employee relationship. It is said, "But it does not follow from the fact that Hust was technically the Government's employee that he lost all remedies against the operating 'agent' for such injuries as he incurred." Certainly Hust did not lose his remedies against the agent for the agent's torts. He still has those remedies but petitioner wishes to hold the agent as an employer. There is here no "disruption" of the normal and past relationship between seaman and employer. This Court errs, we think, in suggesting any seaman has been deprived of any right by the Clarification Act of 1943 under the construction of the Oregon Supreme Court. No seaman ever had a right of recovery under the Merchant Marine Act except against his employer. That the seaman still has.

What the Clarification Act does and what it obviously was intended to do, see notes 7 and 9, *supra*, was to continue the policy of requiring seamen who were employees of the United States to continue to vindicate those rights through the Suits in Admiralty Act. Congress has been generous in permitting seamen to recover in court against the United States for torts. It felt that the traditional proceeding in admiralty offered the best opportunity for justice to all such injured seamen when they were employees of the United States.[12]

A convenient summary of the attitude of the administrative agencies toward this problem is found in a letter of the War Shipping Administration to the National Labor Relations Board of October 20, 1942.[13] Such administrative determination is entitled to weight.

We think that the judgment of the Oregon Supreme Court should be affirmed.

Mr. Justice FRANKFURTER and Mr. Justice BURTON join in this dissent.

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[12] See Remedies of Merchant Seaman Injured on Government Owned Vessels, 55 Yale Law Journal 584, 591.

[13] "The War Shipping Administrator has been advised that under the contractual arrangements mentioned above and for other reasons, the Master, officers and members of the crew of all vessels owned by or bareboat chartered to the War Shipping Administration are employees of the United States and particularly of the War Shipping Administration, and are so considered and treated at the present time by other governmental departments and agencies for the purposes of the Civil Service Retirement Act, the United States Employees' Compensation Act, the Federal Social Security Laws, and the Federal Employment Tax laws. Furthermore, the wages of such personnel are exempt from attachment as government employees."